Supreme Court, U.S.
FILED

97-237 JUN 19 1997

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No. _____

In the

Supreme Court of the United States

October Term, 1996

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Ellis R. Lewis, *Petitioner*,

v.

The BOCA Appeals Board of the City of Clarksburg; and the City of Clarksburg, *Respondents*.

and

Ellis R. Lewis, Plaintiff Below, *Petitioner*,

v.

John L. DePolo, individually and as agent for the City of Clarksburg; P. Douglas Gray, individually and as Chairman of the City of Clarksburg Code Enforcement Appeals Board; and the City of Clarksburg, Defendants Below, *Respondents*.

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On Petition for a Writ of Certiorari to the Circuit Court of Harrison County Division 2

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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36 pp

QUESTIONS PRESENTED

1. Whether after condemning an apartment building under a flood plain ordinance, denying a permit to repair, and denying compensation for loss of all economic uses of the land, a city may use its police power to: (1) order the building demolished at the owner's expense, when no emergency is alleged, (2) issue a criminal charge for failure to maintain the building, (3) seek fines and incarceration if the owner is unable to demolish the building, and (4) seek a prospective judgment for the cost of demolition, without violating the owner's Fifth and Fourteenth Amendment rights?

2. Whether Fifth Amendment guarantees of due process are violated when a state circuit court judge grants summary judgment, without a motion by one of the parties, without notice, without discovery, and without the right to present evidence, when complex claims of inverse condemnation, trespass and contract violations have been alleged?

PARTIES

The parties to the underlying proceeding for which review is sought are:

Petitioner/Plaintiff below:

Ellis R. Lewis

Respondent/Defendants below:

The BOCA Appeals Board of the City of Clarksburg

The City of Clarksburg

Defendants below:

John L. DePolo, individually and as agent for the City of Clarksburg

P. Douglas Gray, individually and as Chairman of the City of Clarksburg Code Enforcement Appeals Board

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OPINIONS BELOW

Lewis v. The BOCA Appeals Board of the City of Clarksburg; and the City of Clarksburg

Lewis v. DePolo, Gray, and the City of Clarksburg

Stay of Judgment Order, Entered September 18, 1995 (Appendix No. 1)

Judgment Order, Entered August 3, 1995 (Appendix No. 3)

Findings of Fact and Conclusions of Law, Entered Nunc Pro Tunc the August 3, 1995, September 18, 1995 (Appendix No. 5)

Protective Order, Entered June 8, 1995 (Appendix No. 12)

Order, Entered May 17, 1995 (Appendix No. 14)

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JURISDICTION

This case involves the unlawful taking without compensation of a twenty-seven unit apartment building that formerly housed elderly and low-income residents. The Respondents damaged the property by the malfunctioning of their municipal storm drainage works and then used the damage as an excuse to condemn the property without paying for it. The petitioner sought relief under the Fifth and Fourteenth Amendments to the U.S. Constitution because the Respondents had taken his property without due process of law, and denied him equal protection of the laws.

The federal questions were raised early in the litigation (due process was raised when this case was filed on August 24, 1990;[1] claims of compensation were first raised during the administrative hearing held by the BOCA appeals

[1] Appendix page 82.

board,[2] federal constitutional claims to compensation were first raised on November 5, 1993[3]) and pursued throughout. The Circuit Court of Harrison Country Division 2 issued Summary Judgment orally on June 23, 1995[4] and by Judgment Order, August 3, 1995.[5] The Supreme Court of Appeals for West Virginia refused a petition for appeal without explanation on February 20, 1997. This Court granted a thirty day extension to the ninety days allowed for filing a petition for certiorari on May 13, 1997.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions appear in the appendix hereto:

United States Constitution, Amendment 5

United States Constitution, Amendment 6

United States Constitution, Amendment 14, Section 1

West Virginia Rules of Civil Procedure, Rule 56 and Rule 57

West Virginia Code, Chapter 29A, State Administrative Procedures Act

West Virginia Constitution, Article 3, § 10, Article 3, § 17

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[2] September 12, 1990 "...the City could have and perhaps should have condemned my building, torn the building down..., and compensated me for the loss of my income." (BOCA Minutes pg. 186). On October 3, 1990, Lewis said, "...It is clearly a proper use of block grant funds, ...of UDAG repayments to clear blighted areas, to tear the building down, to pay me for it even." (BOCA Minutes pg. 196).

[3] Appendix page 72.

[4] Appendix pages 84 - 106.

[5] Appendix page 3.

Clarksburg Ordinances, Article 1725 Building Inspector, Article 1747 Flood Control

STATEMENT OF THE CASE

This is a case where a city's public works damaged an apartment building and the City then used that damage as an excuse to condemn the apartment building under a flood plain ordinance with no compensation to the owner. The city rejected claims of contract responsibilities related to problems with its own sanitary sewer line and payment for trespass due to a faulty storm drainage system. Instead, it sought fines and imprisonment if the owner failed to demolish the building at his expense.

Purchase of the Property - Ellis R. Lewis (herein after Lewis) purchased a twenty-seven unit apartment building on the eastern bank of Elk Creek in downtown Clarksburg, West Virginia, in January 1980, and began immediate renovation of the circa 1913 structure. The city certified the project's compliance with the city's Flood Plain Ordinance 1747[6] and the building's structural soundness.[7] Permits were issued, and five years of major renovations valued at over $250,000[8] were undertaken. Much of the work was done by Lewis, himself. In addition, Lewis purchased neighboring land to provide parking and a playground. By 1982 the building was

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[6] Clarksburg's City Engineer Hugh Marsh issued certification on August 13, 1980. Appendix 110.

[7] Water Board engineer Henry Trasher approved on August 15, 1980. Appendix 109.

[8] Addressing code deficiencies, providing new electrical services, renovating kitchens and bathrooms, and installing new copper water lines and schedule 40 wastes.

formally appraised at $301,600.[9]

Initial Observation of Storm Drainage Problems - Suspecting storm drainage problems due to the presence of large masses of ice in the street in front of the building and observable soil settling adjoining the building's upper retaining wall, in June of 1981, Lewis contacted the city manager.[10] Following engineering studies by MSES Engineers, public hearings, and a legal opinion (unknown to Lewis until well after 1990)[11] that found possible liability for the city with a potential condemnation of the building, the city received federal block grant moneys to remedy the problem in October of 1984. The block grant application was specifically earmarked

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[9] The parties to the suit have not agreed upon a valuation for the building after 1982. Regular work to renovate the apartments continued throughout 1983, 1984 and 1985.

[10] Appendix 108.

[11] Consultant to the City, Attorney J. Michael McDonald, of McNeer, Highland & McMunn, wrote to Clarksburg's Community Development Agency on May 8, 1985. On page 3 of his *Memorandum - Re: Monticello Avenue Water Project*, he wrote "The city has been put on notice of the existence of a condition which could endanger human life as well as property." His nine page memorandum analysed the types and degree of legal responsibility the city would incur if it did or did not drill to establish the flow of surface or subsurface waters, and detailed the parties the city should notify of potential adverse affects. On page 7 he wrote, "...it is our opinion that the City should proceed with the drilling project. " He recommended that if the city wanted to construct additional pipelines that they "should approach the owner and request that he pay for the construction of the pipeline system in front of the building," (page 8) or, share the cost with the apartment owner, or, "condemn the two to three foot strip of property in front of the apartment building necessary to install the collection system. The last alternative would not only involve the cost of the collection system, but would also require that just compensation to paid to the owner of the property for the taking of this land. However, given the very expensive nature of constructing the line on the east side of Monticello Avenue, this alternative could prove more cost efficient." (page 8-9).

for this building. The city's application stated, "A 27-unit apartment house, occupied primarily by elderly and low income residents, is being adversely affected by the water conditions." The work to remedy the problem was not begun until 1987, however, and at this writing remains unfinished.

The city's storm drainage system collected storm waters from several blocks and discharged the water from a ten inch drain pipe into a porous channel directly opposite and above petitioner's building. Each time it rained water flowed across and under adjoining Monticello Avenue, saturated the soil abbuting the building's foundation and upper retaining wall, and increased lateral forces acting upon the wall. Five consulting engineers and City Engineer George Duffer agreed the retaining wall was distressed by lateral pressures.[12]

The city's diversion of water in its storm drain system and failure to comply with contractual obligations for a sanitary sewer easement were alleged by Lewis to be proximate causes of the progressive failure of portions of the foundation,[13] exacerbated when, on November 5 and 6, 1985, Elk Creek flooded and water rose under the building, inundating the foundation and furthering its erosion. Storm water caused no direct damage to occupied living spaces and no tenants were displaced.

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[12] On August 2, 1996 George Duffer wrote a four page analysis detailing damage to the foundation. In April of 1985, prior to the flood, a study was done by Mountain State Environmental Services, damage assessment after the flood was conducted by Thrasher Engineering, and later studies were done by Onas Aliff, Larry Luttrell and Glen Dyer.

[13] Expert testimony from Onas Aliff, Civil Engineer, and Dr. Larry Luttrell, Civil Engineering Professor from the West Virginia University School of Engineering corroborate these findings, but their depositions were not allowed to be submitted into evidence.

Condemnation Notice Citing the Flood Plain Ordinance - Lewis requested permits to repair the flood damaged foundation on May 20, 1986.[14] In spite of the city's role in causing the damage, Lewis (at that time) was going to do the repairs at his own expense. Clarksburg issued a denial to repair or make additional renovations.[15] On May 23, 1986, the city issued a *Condemnation Notice*[16] citing Flood Plain Ordinance 1747.09.

Lewis paid the full cost of relocation for all of his tenants. The building was vacated by August 15, 1986. Lewis was responsible for keeping the building boarded up and safe. It was never alleged that he failed to do so.[17]

Lewis was not informed of any statutory or constitutional rights to compensation, nor was he allowed to salvage valuable materials from the site to offset his losses[18] or pay for demolition of the structure. Instead he was advised that his only recourse was to contact the Small Business Administration (SBA) for a loan. Seeing this as a possible way to obtain partial compensation for his loss, and unaware of Constitutional rights to inverse condemnation due to loss under a flood plain ordinance, or the attorney's memorandum to the city regarding the city's responsibility for the storm drain system, Lewis pursued disaster loan funding. The SBA funded the loan, but cancelled after the city and the leinholder

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[14] The cost of repairs is in dispute. Lewis claimed under $100,000, while the city estimates were closer to $200,000.

[15] Appendix 108.

[16] Appendix 35.

[17] Lewis allowed the property to be taken for taxes on November 23, 1992, but retained a legal interest in the building until it was purchased by the Urban Renewal Authority of the City of Clarksburg on December 1, 1994 for the value of the unpaid taxes. Lewis had paid taxes on the property through 1991. Appendix 107.

[18] The lienholder bank demanded that salvage be halted.

informed the SBA that they were considering rescission of the condemnation order. Lewis sued the SBA, and Clarksburg, Clarksburg Officials and the leinholder bank (the latter three for tortious interference with his loan request) in federal court. That court issued summary judgment ruling that the SBA had discretion to deny loans without a reason, and Lewis therefore had no expectancy with which to interfere.

Demolition Order Without Option To Repair With Threats of Fines and Incarceration - Four years after condemnation (with his federal suit against the city pending) on August 9, 1990, a *Demolition Order Without Option To Repair*[19] threatened fines and incarceration and brought Lewis before the City's BOCA Code Enforcement Board (Board). Lewis sought access to City files to document his over six year relationship with the city's Community Development (CD) office, which included two formal applications for funding. Only three letters were found in the CD files.[20] The Engineering Department files, required by Clarksburg Ordinance 1725.03c, were entirely missing.

BOCA Board Ruling - On August 24, 1990 Lewis filed a *Petition to Modify and/or Withdraw BOCA Citation*[21] noting the availability of federal disaster funds to the city at the time of issuance of the condemnation order, and asserting that, "The city should waive or be restrained from asserting any liens, penalties, costs or imprisonment against petitioner...." On October 4, 1990, the Board, without factual findings, ordered Lewis to begin demolition within 30 days and complete it within 120 days after that.

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19 Appendix 33.

20 Lewis retained in his own files numerous documents and two sets of plans and specifications.

21 Appendix 82.

First Appeal of BOCA Board's Ruling to the Circuit Court and Remand - Lewis appealed to the Circuit Court of Harrison County, Division 1, case number 90-C-780-1 ('90 case). The court remanded, requiring findings of fact and consideration of modification evidence.[22] While preparing for the next hearing, Lewis discovered a sanitary sewer easement which contained city guarantees of the building's structural integrity (because of the proximity of the city's sewer line).[23] Reasserting the claims set forth in his appeal, Lewis prepared a "*BOCA Appeal Remand,*"[24] made claims regarding the sanitary sewer, and reminded the Board that the original condemnation was under the flood plain ordinance. These documents were submitted to the Board, but were never considered by the Board as called for by the remand order.[25] The remand resulted in a decision of the Board affirming the *Demolition Order Without Option to*

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[22] Remanded on April 20, 1991. Appendix 27.

[23] A copy of this document was placed in the BOCA record. Lewis alleged that Clarksburg was in violation of the sewer easement in that the sewer encroached within the required setbacks from the buildings foundation. *Change order #2* (illustrated on a map) included installation of a large combination sewer bisecting the foundation. Lewis sought the change order with a Freedom Of Information Act request, but was informed the documents could not be found.

[24] It included twenty-one reasons for modification of the demolition order, and a "*Factual Statement*" identifying documents and deposition testimony.

[25] "Mr. DePolo stated that he did not feel, that in the judge's [McCarthy's] order, that evidence could be presented at this time that have(sic) not been considered at the last hearings." The documents were not found in the BOCA Board's records. However, counsel for the city later stipulated to their inclusion in the record on appeal to the Circuit Court on September 27, 1994. Board Attorney DePolo had advised the Board that, "...he has the right, under the code, to appeal this decision to the Circuit Court. The Circuit Court can then listen to every argument he has."

Repair on November 6, 1991.[26]

Second Appeal to Circuit Court and Clarksburg's *Complaint for Declaratory Judgment* - Lewis' Amended Appeal to the Circuit Court of Harrison County was filed on June 24, 1992.[27] Clarksburg responded with a motion to dismiss and a request for declaratory judgment in the amount of $160,000. Lewis alleged that this was an improper action within administrative appeal,[28] as the adminstrative proceeding was criminal in nature and the declaratory judgment action was civil. Lewis counterclaimed arguing that Clarksburg was responsible for the storm and sanitary sewers, could obtain of federal moneys to demolish flood damaged property, and lacked of evidence in support of the $160,000 anticipatory costs for demolition.[29]

Lewis Brings Separate Civil Suit for Breach of Contract, Trespass, Inverse Condemnation, Etc. In 1993, Lewis filed a new civil suit against Clarksburg ('93 case)[30] alleging breach of contract[31] (Count VII), trespass (Count

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[26] Appendix 27.

[27] Appendix 78.

[28] In *FMC Corp. v. West Virginia Human Rights Comm'n*, 403 S.E. 2d 729 (W.Va. 1991) that court held that, "An administrative proceeding on appeal in circuit court cannot be transformed into an action at law for damages."

[29] September 29, 1992.

[30] Complaint 93-C-792-1 was filed October 7, 1993. Lewis had lost his federal suit in 1992. Lewis was advised by Judge McCarthy that he had the right to file such a suit. The '93 case, a civil suit, operated on different legal principles than the '90 case and addressed issues never raised in any court by Lewis. In the '90 case Lewis sought to show that he was not responsible for demolition, but with the '93 he sought compensation for his loss.

[31] Lewis did not become fully aware of the degree of the breach of contract, or that a contract existed until 1991. Minutes of the BOCA meeting held on October 7, 1991 note that, "Mr. Rodd showed deeds for the right-of-was(sic) acquired by the City for this sewer and there were

VI), inverse condemnation (Count IV), failure of the City's engineering department to maintain records (Count VIII) and other tort claims. On December 7, 1993, on the court's own motion, the new '93 case was transferred to Division 2.

Pretrial Briefs and Rulings in Divisions 1 for '90 case - Judge McCarthy ordered the parties, to brief whether the City had, under any circumstances, legal right or authority to obtain prospective declaratory or injunctive relief requiring an owner to undertake an affirmative act to demolish a building.[32] On July 21, 1994, Judge McCarthy held in favor of the prospective declaratory or injunctive relief question, upon findings, and transferred the '90 case to Division 2, as well. Unfortunately, no record exists of Division 1 proceedings.[33]

Motions to Dismiss and Denial of Discovery in Division 2 - In Division 2, Judge Bedell entered a detailed scheduling order for discovery and a trial date. Judge Bedell said that orders and motions for the two cases would be considered on the same days for convenience. Lewis prepared a brief, including arguments based in part upon this Court's ruling in *First English Evangelical Lutheran Church v. Los Angeles County* 482 U.S. 304 (1987) and raised Fifth and Fourteenth Amendment claims.[34] Motions to Dismiss were filed by Clarksburg's attorneys.[35] Lewis filed interrogatories,

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several clauses in these deeds stating that the City would have responsibility for the integrity for the upper retaining wall. (Mr. Rodd produced actual copies of the deeds) The deeds stipulated that the City would retain a continuing liability for any problems associated with failure of the storm drains." (BOCA Minutes pg. 222).

[32] The city filed its brief on October 7, 1993. Lewis filed a pro se Response Brief, to which the City filed a Reply Brief.

[33] Lewis alleged that this was a violation of his due process rights.

[34] Appendix 69.

[35] Motions to Dismiss were filed on November 15, 1990, September 29, 1992 and November 4, 1993, but no substantive response was made by the city to Lewis' claims in the Counterclaim or in his 1993

requests for admissions and requests for production in both cases. The city filed motions for protective orders, which were granted at the April 5, 1995 hearing[36] resulting in a denial of discovery to Lewis and his attorney. The request for protective orders cited "effort.., time.., expense... and the [lack of the Court's] ruling on pending motions to dismiss."

Summary Judgment Without Motion, Notice, Discovery and Opportunity to Respond - Finally, on June 23, 1995 at a hearing on the motions to dismiss, the court announced summary judgment. No motions for summary judgment were filed by either party under West Virginia Rules of Civil Procedure 56. No notice was given that summary judgment would be considered as required by Rule 56. Judge Bedell stated that the '90 case was not a jury issue and affirmed the BOCA Board's decision. The judge stated that under new interpretations of Rule 56 he had discretion to change a hearing for a motion to dismiss to a hearing for summary judgment in the '93 case. Lewis' attorney objected to the summary judgment,[37] but the court granted summary judgment for the defendants in the '93 case.

On August 3, 1995 Judge Bedell issued a *Judgment Order*,[38] which incorporated by reference *Findings of Fact*

Complaint.

[36] Order entered May 17, 1995 and extended . Appendix 12.

[37] Trial counsel objected to the lack of notice, denial of discovery and lack of opportunity to present argument and evidence against granting of a summary judgment motion. Judge Bedell responded by stating, "Okay, counsel, let me note all that for the record and I have a sneaky suspicion that someone may look over my shoulder on this and that's fine. Not to be glib about it, but my paycheck will come at the end of the month whether they reverse me or whether and have me and think that I am the world's dumbest or laziest judge like the former Justice Neeley or whatever." (errors of grammar in original transcript Appendix page 106).

[38] Appendix 3.

and Conclusions of Law, entered on September 20, 1995, *nunc pro tunc* August 3. The court: [1] affirmed the BOCA Board rulings (which included the provision for fines and incarceration after April 2, 1992) applying an Administrative Procedures Act standard; [2] dismissed with prejudice the Petition for Appeal in Civil Action No. 90-C-780-2; [3] was silent on the specifics of the $160,000 declaratory judgment action, but did find that the right to obtain prospective judgment was the law in this case; [4] granted summary judgment for the city in Civil Case 93-C-792-2; [5] found that contractual obligations and trespass allegations, while possibility legitimate, were filed outside the statute of limitations which he ruled started in 1980 or 1985 at the latest; [6] was silent on the numerous factual issues raised in Lewis' *Statement of Issues;* and [7] was silent on the issue of inverse condemnation.[39] Judge Bedell issued a stay of his order, "until a final determination is made by the Supreme Court of Appeals of West Virginia."

Appeal to Supreme Court of Appeals for West Virginia - Lewis appealed to the Supreme Court of Appeals for West Virginia on October 25, 1995.[40] On February 20, 1997 that court "refuse[d] said petition for appeal," without comment. A *Notice of Appeal* was filed with that court on March 19, 1997. A *Renewal of Petition* was filed with that court on April 30, 1997 reasserting Constitutional claims and apprising the court of the evidence of the faulty storm drain and sewer system gathered when the building was demolished

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[39] Conclusions of Law #19 (appendix page 10) states that Count IV deals with procedural irregularities. Reference to Appendix page 61 will illustrate that Count IV deals with inverse condemnation.

[40] The appeal included Lewis' claim to "constitutional safeguards when a person's property and liberty interests are potentially or actually subject to adverse state action." (Appeal page 17.) Argument 16 of the Appeal repeated Lewis' takings issue argument and reasserted Fifth and Fourteenth Amendment claims.

in 1996. The *Renewal of Petition* was denied on May 1, 1997.

Postscript: Demolition and New Evidence - When the city's Urban Renewal Authority finally demolished the building in the fall of 1996, more than ten years after condemnation, removal of the building and portions of the foundation brought an immediate collapse of the adjacent Monticello Avenue. Two sanitary sewer lines which were once under the building had to be rebuilt. Only emergency placement of 11,000 tons of large aggregate (rock) at the site could stabilize the hillside. This confirmed Lewis' claims of storm sewer and sanitary sewer impacts upon the building's foundation.

REASONS FOR GRANTING CERTIORARI

The facts in this case apply to the legal and financial misfortunes of one man, but the implications of the lower court's ruling and its actions have relevance for every American. We are taught to believe that in this country every person has due process rights. We are taught that the government cannot take your property without compensation in eminent domain. We are not taught the complex nuances of inverse condemnation. As Justice Stevens once put it, "even the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[41] Nor do current law or the Court's policy require that citizens be informed of their rights. We Mirandize those arrested, but we do not mandate informing property owners of their rights when government acts against their financial interests or threatens incarceration. If the Court fails to act on this case it sends a dangerous message to Clarksburg, West

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[41] Nollan v. California Coastal Commn. (1987) 483 U.S. 825,866 (dissenting opinion).

Virginia (where media coverage has been extensive) and to towns across America: you can condemn property, you can violate due process, and you can reap financial rewards for doing so, or at least you can avoid financial responsibility. To allow the actions taken against Lewis to stand is to encourage other cities and states to act similarly. Thousands of property owners - victims of flood, tornado, earthquakes and hurricanes, and negligent city governments - could find their property condemned, the opportunity to salvage items from their homes and businesses or to repair them refused, and then be sued by their government as criminals for the condition of their property.

1. The decision below conflicts with decisions of this Court and other courts finding inverse condemnation liability because of flood plain ordinances:

This case originates with a regulatory "taking." This Court has consistently held that just compensation is guaranteed by the Fifth and Fourteenth Amendments when a public entity "takes" private property without initiating eminent domain under several circumstances. In every non-emergency instance appropriate due process is necessitated.

Application to Flood Plain Ordinance - The case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) is directly on point here. In that case the Court found a rule of liability with respect to application of flood plain ordinances. In the issue now before this court, the "taking" is effectively permanent, clearly a stronger application than that in *First Evangelical.*[42]

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[42] See also *Dooley v. Town Planning and Zoning Commission* (Conn. 1964) 197 A 2d 770, 773-774, finding a taking because of the use prohibition in a flood plain ordinance.

No Trespass Without Compensation - Starting with *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).[43] this Court has required compensation when a public right of way, even one underground, such as the faulty storm drain system or the sewer line in this case, trespasses upon private land. This argument is strengthened by the ruling in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982) which found that any permanent physical occupation of property, no matter how slight, amounted to a taking.

In a California case, *Yee v. City of Sausalito*, absolute liability was imposed when diverted water from a collapsed storm drainage scheme caused property damage.[44]

Impact on Economic Use, Investment Backed Expectations and Right to Repair - With *Agins v. City of Tiburon* 477 U.S. 255 (1980) this Court established an impact test for the application of inverse condemnation, or regulations that have an undue impact on landowners depriving them of all practical uses, all reasonable uses, all beneficial uses, or all economic uses of their property. Similarly, in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the Court added the extent to which the regulation has interfered with "distinct investment-backed expectations." Lewis clearly had distinct investment-backed expectations for an economic use of his property. He had invested over $250,000 in repairs and upgrades alone. This was a rental property. It generated an income stream and significant tax dollars. It had been functioning as an apartment

[43] "...The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation." A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605, 28 S. Sup. Ct. 331, 13 Ann. Cas. 1008.

[44] *Yee v. City of Sausalito*, 141 Cal. App.3d 917, 190 Cal. Rptr 595 (1983).

building for decades, and Lewis knew that when he bought it.

When the city denied him a permit to repair, they denied him the opportunity to repair the foundation even at his own expense. The decisions of the West Virginia courts upholding this denial conflict with other state court decisions. Those decisions reflect a general presumption that where no emergency exists, owners must be afforded the opportunity to repair damaged structures. While the cost of allowable repairs relative to value of the structure varies, there appears general consensus that the structure must be beyond reasonable repair before the government can deny a repair permit.[45]

Original Title Granted Use - In *Lucas v. South Carolina Coastal Council*[46] this Court summarized and expanded upon its previous rulings and held that inverse condemnation only applied if the original title to the property allowed the desired use. This case satisfies the *Lucas* formulation,[47] Lewis' original title included the right to an apartment building; he was not attempting to use the property for a new purpose. If, as called for in *Lucas*, "case-specific inquiry" were applied, one would find that Lewis had suffered a "physical invasion" of his property. And finally, as called for

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[45] *Inman v New Hartford* (1986, 4th Dept) 116 App Div 2d 998, 498 NYS2d 618; *Poughkeepsie v Clifford* (1986, 2d Dept) 120 App Div 2d 695, 502 NY S 2d 768; *Albert v. Mountain Home* (Idaho) 337 P2d 377; *Aurora v. Meyer*, 38 Ill 2d 131, 230 NE2d 200; *Childs v. Anderson*, 344 Mich 90, 73 NW2d 280; *Application of Suffern*, 12 App Div 2d 769, 209 NYS2d 599; *Newton v. Highland Park* (Tex Civ App) 282 SW2d 266; *Jarvis v. Baltimore*, 248 Md 528, 237 A2d 446. *Horton v. Gulledge* 277 N.C. 353, 177 S.E.2d 885, 890 (1970).

[46] *Lucas v. South Carolina Coastal Council* 505 US 1003, 120 L Ed 2nd 798, 112 S Cr 2886 (1992).

[47] "...the state may resist an asserted right to compensation ...only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with..."

in *Lucas*, Lewis was denied "all economically beneficial or productive use of land."

Abuse of the Police Power - In the present case the West Virginia courts did not stop at denial of inverse condemnation claims, they went further to allow an abuse of the police power. As noted by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,

> "When this seemingly absolute protection [Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."

Further clarification of when police power can be applied was given in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 at 593 (1962). This Court held that federal or state regulations prohibiting the use of property to protect the "...health, morals or safety of the community..." were an appropriate application of the police power when, "legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it..." Here, Lewis has been prevented from continuing a perfectly lawful use of his property. The city took advantage of damage caused by its own storm drain system to condemn the property under its flood plain ordinance. Such an action takes Lewis' property without either due process or just compensation. It is illegal.

2. The decision granting prospective injunctive relief conflicts with this Court's decisions that authorize such punitive destruction only in cases of emergency or imminent danger - The cases discussed in point one above illuminate the need to provide compensation for taking of the type applicable to the case before this Court. But, there is a related

issue: whether the city can order the building demolished - at the owner's expense and under threat of criminal prosecution - if there is no emergency. This Court's standard teaching is that it may not.[48]

The Circuit Court erred when it upheld Judge McCarthy's rulings granting prospective relief requiring Lewis to undertake an affirmative act to demolish a building, in the absence of factual development[49] and without distinguishing emergency police power considerations from those applicable to this case.[50]

The West Virginia Code and Ordinances of the City of Clarksburg, which explicitly provide a remedy if the owner fails to comply with the municipality's code enforcement action, state that the remedy "shall be a lien against the real property upon which such costs were incurred."[51] While the Building Commission may order demolition, the *only* express provision in the Code or the Ordinance, for recovery of costs, is the placing of a lien upon the property "after the sale of any and all salvageable material is credited to the account."[52] No such proper salvage occurred and no credits could be given

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[48] See for example, *Hadacheck v. Sebastian* (1915) 239 U.S. 394 where a brickyard created a nuisance for its neighbors and *Miller v. Schoene* (1928) 276 U.S. 272 where cedar disease threatened a commercial apple crop.

[49] Judge McCarthy's recommendation was contingent upon a finding that the defects in the BOCA proceedings were not material nor prejudicial. This did not occur because the appeal was denied in the '90 case, and summary judgment was rendered in the '93 case.

[50] The West Virginia Supreme Court's ruling in *State Ex Rel State Line Sparkler v. Teach*, 418 S.E. 2d 585 W.Va. (1992) is distinguishable as that case involved the hazardous manufacture of explosive products after issuance of stop orders.

[51] *W.Va. Code* 8-16-12, and *Codified Ordinances of the City of Clarksburg* Section 1725.02(f).

[52] *Id.* 1725.02(f).

to Lewis.

Moreover, according to both Federal Rules of Civil Procedure Rule 57 and West Virginia Rules of Civil Procedure 57 Lewis was entitled to a jury[53] hearing on these matters. The ruling in the '90 case denies Lewis' Constitutional rights to due process under the Fifth and Sixth Amendments of the United States Constitution. Additionally, Lewis was denied the opportunity to present full evidentary support for his complaint.

Absent his Sixth Amendment rights Lewis faces 30 days in jail for each day he failed to demolish the building after April 1992. Since the Circuit Court merely upheld the BOCA Board ruling granting a right to incarceration and stating no maximum penalty, Lewis, now fifty-five, could spend the rest of his life in jail.

3. **The manner in which the Circuit Court of Harrison County acted denied Lewis his right to due process of law.**

Notice Announced by Judge on Day of Ruling - The Judge announced summary judgment. This deviates from Rule 56 which calls for a motion by one of the parties. Additionally, oral motions (or in this case oral notice) for summary judgment are not authorized under Rule 56.[54] When a motion for summary judgment is made, the moving party bears an initial burden of,

> "informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if

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[53] In *McClung v. Marion County, 360 S.E.2d 221 (W. Va. 1987)* the state court ruled that these rights exist.

[54] *Cool Fuel, Inc. v. Connett* (9th Cir. 1982) 685 F2d 309, 311.

> any,' which it believes demonstrate the absence of a genuine issue of material fact."[55]

The judge did not fulfill these requirements.

Rule 56(c) also provides that : "the motion shall be served at least 10 days before the time fixed for the hearing." Several courts have ruled[56] in support of the ten day notice requirement. In *Celotex Corp. v. Catrett,* this Court held that lower courts could, "...enter summary judgment *sua sponte, so long as the losing party was on notice* that she had to come forward with all her evidence." (Emphasis added.) In this case there was : notice.

Discovery Denied - In *Anderson v. Liberty Lobby,* 477 U.S. 242 this Court ruled that the party opposing summary judgment must have had sufficient opportunity through discovery to gather the evidence necessary to avoid summary judgment, and that,

> "a continuance of summary judgment is mandatory upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion."

No such opportunity was afforded Lewis despite his counsel's objections. The decision below conflicts with the decisions of numerous other courts, holding that a motion to dismiss could not be converted to motion for summary judgment if a

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[55] *Celotex Corp. v. Catrett,* 477 U.S. 317 (at 323).

[56] *Management Investors v. United Mine Workers of America,* C.A. 6th, 1979 610 F2d 384; *White v. Texas Am. Bank/Galleria,* N.A., 958 F.2d 80 (5th Cir. 1992); *Brooks V. Hussman Corp.,* 878 F.2d 115 (3d Cir. 1989).

In *Scott v. Courtesy Inns, Inc.,* C.A. 5th 1973, 472 F 2d 563. the court held that it was an error to treat defendant's motion to dismiss as a motion for summary judgment without first giving plaintiff at least ten days notice as required by the rules.

stay prevented the plaintiff from conducting discovery.[57] A failure to allow discovery has also been found to require reversal,[58] as this is a violation of constitutionally guaranteed due process rights.

Finally, rule 56(f), allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery. Lewis had been denied discovery by the protective order. The city's inability to locate records germain to the building similarly undermined discovery efforts.

No Opportunity to Present Evidence - A full and fair opportunity to develop and present facts and legal arguments in support of one's position is a critical part of a summary judgment ruling. Several cases illustrate broad support for this principle.[59]

Burden of Proof - Had evidence been submitted to defend against a motion for summary judgment the burden of proof would have required that the court consider the persuasiveness of evidence and plausibility of nonmovant's claim.[60] Additionally, while the nonmoving party bears the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at

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[57] *Maritrend, Inc. v. Galveston Wharves, D.C. Tex.* 1993 152 F.R.d. 543. and *DiMartini v. Ferrin* (9th Cir. 1989) 889 F2d 922.

[58] *Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins. Co.*, 958 F.2d 836 (8th Cir. 1992).

[59] *Portsmouth Square v. Shareholders Protective Comm.* (9th Cir. 1985) 770 F2d 866, 869; *Cool Fuel, Inc. v. Connett* (9th Cir. 1982) 685 F2d 311-312. In *U.S. v. J.B. Williams Co.*, C.A. 2d, 1974, 498 F.2d 414 the court found a right to adduce testimony of live witnesses and cross-examine opponent's witnesses, if the party opposing summary judgment raises any triable fact questions.

[60] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

trial.[61] The nonmoving party creates a genuine issue of material fact if it provides sufficient evidence to allow a reasonable jury to find for him at trial.[62]

That's the way it is *supposed* to work. However, when the trial court considers the matter without notice and then refuses to permit discovery to allow the responding party to demonstrate the validity of his position, there has been an evident denial of due process.

The matter before the court involves numerous disputed material facts. Among them are: the property's condemnation under a floodplain ordinance (a type of inverse condemnation); breach of contract regarding the sewer; and trespass regarding the storm drain. Additionally, numerous matters including timeframes and cost, are in dispute. To allow summary judgment, as it was applied in this case, to stand is to set a precedent that will take summary judgment law into territory unforseen by its creators in 1938, and uncharted by any current law.

Had the city of Clarksburg addressed its responsibilities with regard to the storm and sewer systems the property would never have been condemned, all subsequent litigation could have been avoided, and abuses of Fifth, Sixth and Fourteenth Amendment rights would not have taken place. Clarksburg, West Virginia is a small town and a county seat. If this city's actions, and the county circuit court rulings

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[61] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53 (1986). See also, *Sempier v. Johnson & Higgins*, 45 F.3d 724, 727 (3d Cir.), cert. denied, 115 S. Ct. 2611 (1995). Fed. R. Civ. P. 56(c). Sempier, 45 F.3d at 727; *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1413 (3d Cir.), cert. denied, 502 U.S. 941 (1991). III.

[62] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

upholding them are allowed to stand it will send a message. The message will be your city can violate your constitutional rights and the right to earn and hold private property fought for since the time of John Locke. The message, especially to citizens in small town America, will be you can't fight city hall, so don't even try.

CONCLUSION

For the foregoing reasons, I respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

Ellis R. Lewis, Pro Se
P.O. Box 2403
Riverside, Ca. 92516
(909)685-6675

June 20, 1997

FILED

(2)

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OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1996

◆

Ellis R. Lewis, *Petitioner*,

v.

The BOCA Appeals Board of the City of Clarksburg; and the City of Clarksburg, *Respondents*.

and

Ellis R. Lewis, Plaintiff Below, *Petitioner*,

v.

John L. DePolo, individually and as agent for the City of Clarksburg; P. Douglas Gray, individually and as Chairman of the City of Clarksburg Code Enforcement Appeals Board; and the City of Clarksburg, Defendants Below, *Respondents*.

◆

On Petition for a Writ of Certiorari to the Circuit Court of Harrison County Division 2

◆

Joint Appendix

◆

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APPENDIX

I. OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF CIRCUIT COURT OF HARRISON COUNTY DIVISION 2

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1. Stay of Judgment Order, Entered September 18, 1995

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner,

v. CIVIL ACTION NO. 90-C-780-2

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG,
Respondents.

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff,

v. CIVIL ACTION NO. 93-C-792-2

JOHN L. DEPOLO, individually
and as agent for the City of Clarksburg;
P. DOUGLAS GRAY,
individually and as Chairman
of the City of Clarksburg's Code
Enforcement Appeals Board; and
THE CITY OF CLARKSBURG; Defendants.

ORDER

On September 13, 1995, came Petitioner/Plaintiff, Ellis R. Lewis, and presented to the Court Petitioner's/Plaintiff's Motion for Modification of Stay of Final Order Pending Appeal, and Motion for Submission of Findings of Fact and Conclusions of Law, whereby Petitioner/Plaintiff requests that the Court extend the stay

of the Judgment Order entered by this Court on August 3, 1995, until thirty days after the receipt by Petitioner/Plaintiff of transcripts of certain proceedings.

With respect to Petitioner's/Plaintiff's request for an extension of the stay pending his receipt of the Findings of Fact and Conclusions of Law were entered on August 3, 1995. Petitioner/Plaintiff is free to request a copy of that document from the Circuit Clerk of Harrison County. Therefore, any stay of the Court's August 3, 1995 Judgment Order will not be extended pending Petitioner's/Plaintiff's receipt of such document.

With respect to Petitioner's/Plaintiff's request that the stay be extended pending his receipt of certain transcripts, requests of which were made after the June 23, 1995 hearing, the Court is of the opinion that the stay currently in force should only be extended following notification that the transcripts of the hearings held on April 5, 1995 and May 9, 1995 are available.

It is, therefore, ORDERED and ADJUDGED that the stay of the Judgment Order entered on August 3, 1995 shall be extended for thirty five days following notification to the parties or their counsel by Leslie Queen, Court Reporter, that the transcripts of the April 5, 1995 and May 9, 1995 hearings are available. In the event that Petitioner/Plaintiff does not file a petition for appeal within that time, it is ORDERED that Petitioner/Plaintiff begin the demolition of subject structure within 45 days following the date of notification. In the event that Petitioner/Plaintiff does file his petition for appeal as herein required, the stay of the Judgment Order shall remain in effect until a final determination is made by the Supreme Court of Appeals of West Virginia.

ENTER: September 18, 1995

s/Thomas A. Bedell

Judge Thomas A. Bedell

Judge of the Circuit Court of

Harrison County

2. JUDGMENT ORDER,
Entered August 3, 1995

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner, NO. 90-C-780-2
vs.
THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff, NO. 93-C-792-2
vs.
JOHN L. DEPOLO, individually
and as agent for the City of Clarksburg;
P. DOUGLAS GRAY, individually and as
Chairman of the City of Clarksburg's
Code Enforcement Appeals Board; and
THE CITY OF CLARKSBURG, Defendants.
THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

JUDGMENT ORDER

On June 23, 1995, came petitioner, Ellis R. Lewis, in person and by his counsel, Larry Harless, and came the Respondents, the BOCA Appeals Board of the City of Clarksburg and the City of Clarksburg, by their counsel, Leonard A. Costa, Jr., Gordon H. Copland and Jill O. Florio, in Civil Action No. 90-C-780-2. Also came Plaintiff, Ellis R. Lewis, pro se, and came Defendants, John L. DePolo and the City of Clarksburg, by their counsel, Richard M. Yurko, Jr., and Jill O. Florio, in Action No. 93-C-792-2.

The Court, after carefully considering the entire record in both actions, including the administrative record, pleadings, exhibits, memoranda and arguments of counsel, is of the opinion, for the reasons stated in its Findings of Facts and Conclusions of Law, which document is made a part of this order by reference, that the decision rendered by the BOCA Appeals Board of the City of Clarksburg on November 6, 1991 should be affirmed. The Court is also of the opinion that with respect to Civil Action No. 93-C-792-2, no genuine issue of material fact exists; that Defendants are entitled to judgment as a matter of law on each count; that summary judgment should be granted.

It is, therefore, ORDERED and ADJUDGED that the Petition for Appeal be and it is hereby dismissed with prejudice in Civil Action No. 90-C-780-2; that summary judgment in favor of Defendants be and hereby is granted in Civil Action No. 93-C-792-2; and that Petitioner/Plaintiff recover nothing from Respondents/ Defendants in this action. It is also ORDERED and ADJUDGED that Petitioner/Plaintiff begin the demolition of the subject structure within 45 days following the June 23, 1995 hearing and complete said demolition within 120 days following the hearing.

In light of Petitioner's/Plaintiff's request for a stay of this Order to enable him to appeal from this decision, the Court ORDERS that this order shall be stayed for 30 days following Petitioner's/Plaintiff's receipt of the transcript of this hearing. In the event that Petitioner/Plaintiff does not file an appeal within that time, it is ordered that Petitioner/Plaintiff begin the demolition of the structure within 45 days following his receipt of the transcript.***

To all of which, Petitioner/Plaintiff excepts and objects.

ENTER: August 3, 1995

s/THOMAS A. BEDELL

Judge Thomas A. Bedell

Judge of the Circuit Court of

Harrison County

*** In the event that Petitioner/Plaintiff does file petition for Appeal as herein required, the stay of this Order shall remain in effect until a final determination is made by the Supreme Court of Appeals of West Virginia.

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3. FINDINGS OF FACT AND CONCLUSIONS OF LAW
Entered Nunc Pro Tunc August 3, 1995, September 18, 1995

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner, NO. 90-C-780-2

vs.

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff, NO. 93-C-792-2

vs.

JOHN L. DEPOLO, individually
and as agent for the City of Clarksburg;
P. DOUGLAS GRAY, individually and as
Chairman of the City of Clarksburg's
Code Enforcement Appeals Board; and
THE CITY OF CLARKSBURG, Defendants.
THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On June 23, 1995, came petitioner, Ellis R. Lewis, in person and by his counsel, Larry Harless, and came Respondents, the

BOCA Appeals Board of the City of Clarksburg and the City of Clarksburg, by their counsel, Leonard A. Costa, Jr., Gordon H. Copland and Jill O. Florio, in Civil Action No. 90-C-780-2, for a hearing on a Petition for Appeal from a decision rendered by the BOCA Appeals Board of the City of Clarksburg (the "Board") on November 6, 1991. At the same time, also came Plaintiff, Ellis R. Lewis (Petitioner/Plaintiff), pro se, and came Defendants, John L. DePolo and the City of Clarksburg, by their counsel, Richard M. Yurko, Jr., and Jill O. Florio, in Civil Action No. 93-C-792-2, for a hearing on Defendants' Motion to Dismiss Plaintiff's Amended Complaint.

The Court upon consideration of the administrative record and the pleadings, exhibits and memoranda of law filed in both cases, and upon consideration of the arguments of counsel at the June 23, 1995 hearing as well as at prior hearings, makes the following findings of facts and conclusions of law.

FINDINGS OF FACT

1. On or about August 3, 1990, the Building Commission of the City of Clarksburg issued a notice, pursuant to Article 1725, as amended, of the Codified Ordinances of the City of Clarksburg, declaring Petitioner's/Plaintiff's property located at 272-300 Monticello Avenue to be in violation of the BOCA Basic National Existing Structures Code. The notice further advised Petitioner/Plaintiff that the structure was unsafe, dangerous and unfit for human habitation and ordered the demolition of the structure.

2. In response, Petitioner/Plaintiff filed a "Petition to Modify and/or Withdraw BOCA Citation, 272-300 Monticello Avenue" on or about August 24, 1990.

3. The Board conducted hearings regarding this matter on September 12, 1990 and October 3, 1990 at which time Petitioner/Plaintiff appeared and presented testimony and evidence.

4. On October 4, 1990 the Board issued a disposition whereby it upheld the demolition order and ordered that Petitioner/Plaintiff be given thirty days to begin demolition of the

building.

5. On October 22, 1990, Petitioner/Plaintiff filed an appeal with this Court regarding the Board disposition at Civil Action No. 90-C-780-1.

6. By order dated June 11, 1991, this Court remanded the matter to the Board for further proceedings.

7. In compliance with the Order, the Board held various hearings regarding Petitioner's/Plaintiff's appeal, including two evidentiary hearings on October 7, 1991 and October 30, 1991, at which Petitioner/Plaintiff presented testimony and other evidence and examined and cross-examined witnesses.

8. On November 6, 1991, the Board issued an order affirming the issuance of the demolition order and its prior decision of October 4, 1990.

9. On July 1, 1992, Petitioner/Plaintiff filed an Amended Petition for Appeal in this Court alleging, among other things, that the proceedings of the Board were improper and asking this Court to either void, remand or modify the demolition order.

10. Respondents filed a Motion to Dismiss and Answer of Respondents to Amended Petition for Appeal of Ellis R. Lewis, Counterclaim and Complaint. In their complaint, Respondents asked the Court, among other things, to compel Petitioner/Plaintiff to demolish the subject structure, to declare that Petitioner/Plaintiff is obligated to pay for the full cost of said demolition and to order Petitioner/Plaintiff to pay approximately $160,000 to the City for demolition.

11. Thereafter, Petitioner/Plaintiff filed a motion to Dismiss, Answer, Counterclaim, Motion for Leave to Amend, and Response to the City's Counterclaim and Complaint for Declaratory Judgment.

12. By order of Court dated September 17, 1993 the parties subsequently filed briefs addressing the issue of "[w]hether the City of Clarksburg may, under any circumstances, obtain prospective declaratory or injunctive relief requiring a property owner to

undertake an affirmative act to demolish a building?"

13. On July 21, 1994, the Honorable Daniel McCarthy made findings of fact, conclusions of law, and entered an order authorizing the City to "obtain prospective declaratory or injunctive relief requiring Petitioner Lewis to undertake an affirmative act to demolish the subject structure located on Monticello Avenue, upon a finding by this Court that the alleged defects in the proceedings afforded Petitioner by the BOCA Appeals Board were not material nor prejudicial to Petitioner. Should Petitioner fail to demolish the building at that time, the City may undertake the demolition of the building after seeking judgment against the Petitioner in this Court for the full cost of the demolition."

14. On or about October 7, 1993, Petitioner/Plaintiff filed Civil Action No. 93-C-792-1. The causes set forth therein stem from the proceedings before the Board regarding Petitioner's/Plaintiff's property located on Monticello Avenue. The case was transferred by Judge McCarthy to this Court and now bears Civil Action No. 93-C-792-2.

15. Thereafter, Petitioner/Plaintiff filed an Amended Complaint. Petitioner/Plaintiff restated the allegations set forth in his complaint and added two counts regarding other properties formerly owned by Petitioner/Plaintiff.

16. Defendants in Civil Action No. 93-C-792-2 filed their motions to dismiss, and the Court heard arguments on the motion on December 22, 1993 and November 4, 1994. On the latter date, the Court also heard arguments in Civil Action No. 90-C-780-2 on those issues raised by the appeal of the decision of the Board.

17. None of the parties dispute that the building located on Monticello Avenue should be demolished.

CONCLUSIONS OF LAW

1. The appropriate standard of review in Civil Action No. 90-C-780-2 is analogous to the standard of review required under the State Administrative Procedures Act, W.Va. Code §§ 29A-1-1 through 29A-7-4.

2. The administrative record of the Board proceedings is developed sufficiently. Thus, additional fact-finding is not required in Civil Action No. 90-C-780-2 .

3. The Board's decision was supported substantially by the evidence.

4. The Board's decision was not arbitrary or capricious; was not characterized by abuse of discretion; and was not a clearly unwarranted exercise of discretion.

5. Even when viewing the allegations raised by Petitioner/Plaintiff in a light most favorable to Petitioner/Plaintiff, the allegations do not rise to the level where the Court may substitute its judgment for that of the Board.

6. Any alleged defects in the proceedings accorded the Petitioner/Plaintiff by the Board, even if true, did not substantially prejudice a material right of Petitioner/Plaintiff.

7. The Board accorded Petitioner/Plaintiff substantial due process protections.

8. Thus, the Court affirms the decision of the Board and denies the Petition for Appeal.

9. The order entered by Judge McCarthy in this matter on July 21, 1994, which affirmed the City's right to obtain prospectively a judgment against Petitioner/Plaintiff for the full cost of the demolition, is the law of these cases.

10. Thus the Court requires Petitioner/Plaintiff to begin demolition of the subject building within 45 days following the June 23, 1995 hearing. The demolition must be completed within 120 days following that hearing.

11. With respect to Civil Action No. 93-C-792-2, the appropriate framework for review of Defendants' motion to dismiss is found in Williams v. Precision coil, Inc., No. 22493 (W. Va. March 24, 1995), which sets forth the standards for summary judgment.

12. The Court is not persuaded that Civil Action No. 93-C-792-2 should be dismissed solely on the basis that the lawsuit was merely duplicative of Civil Action No. 90-C-780-1, despite the

existence of an overlap of claims between the two cases.

13. With respect to Count I of the Amended Complaint, the acts of defendant DePolo were taken on behalf of the City as its agent, servant and/or employee, and Defendant DePolo is entitled to a dismissal from this action in his individual capacity. Necessarily, Count I is dismissed.

14. With respect to Count II of the Amended Complaint, Defendant Gray was previously dismissed from this action in his individual capacity. Thus, Count II is dismissed.

15. The West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code §§29-12A-1 through 29-12A-18, is applicable to this action. Pursuant to the Act, Defendants are immune from liability.

16. Additionally, Section 29-12A-7 of that Act bars Petitioner's/Plaintiff's claim for punitive damages.

17. Petitioner's/Plaintiff's allegation of malicious prosecution set forth in Count III is not an appropriate theory. None of the factors necessary to maintain such a cause of action have been established. The proceedings in question were not terminated in favor of Petitioner/Plaintiff, nor were any actions of Defendants taken in retaliation for any actions conducted by Petitioner/Plaintiff.

18. Additionally, any allegations regarding false and improper statements made before the Board, defamatory or otherwise, are privileged. Consequently, those claims arising from such statements are dismissed.

19. In Count IV of the Amended Complaint, Petitioner/Plaintiff again complains of procedural irregularities in the Board Appeal process, including purported improper statements made to the Small Business Administration. Petitioner/Plaintiff raised the same issues in the lawsuit he brought in the United States District Court for the Northern District of West Virginia at Civil Action No. 88-105-C(K).

20. A final decision dismissing Petitioner's/Plaintiff's claims was rendered by the district court, which decision was affirmed by

the United States Court of Appeals for the Fourth Circuit. These claims, therefore, are barred by the doctrine of res judicata or collateral estoppel, and Counts IX and X must be dismissed.

21. Counts V-VII are barred by the applicable statute of limitations. With respect to any claim sounding in tort, a two-year limitations period is applicable. With respect to any claim sounding in contract, a five year limitations period is applicable. The limitations period commenced in 1980 or, at the very latest, in 1985.

22. Thus, Counts V-VII shall be dismissed.

23. With respect to Petitioner's/Plaintiff's allegations set forth in Count VIII regarding the City's maintenance of records with respect to the Monticello property, the Court is unaware of any duty on behalf of the City to maintain records relating to property located within the City for the benefit of private individuals. Even assuming that such a duty exists and that the City breached the duty, Petitioner/Plaintiff has failed to make a sufficient showing on the essential elements of causation and damages.

24. Consequently, Count VIII shall be dismissed.

25. Petitioner/Plaintiff provided no basis for his allegations regarding selective enforcement with respect to the properties described in Counts IX and X of his Amended Complaint. Petitioner/Plaintiff was not singled out for selective treatment based on any impermissible consideration such as race, religion or gender. Petitioner/Plaintiff is not a member of a protected class, nor has Petitioner/Plaintiff presented any evidence demonstrating that the code enforcement orders were issued against his properties for some evil or improper purpose.

26. Thus, Counts IX and X shall be dismissed.

27. The totality of evidence presented in Civil Action No. 93-C-792-2 demonstrates a right to judgment as a matter of law in favor of defendants with respect to each count set forth in the Amended Complaint. Each of those counts, therefore, are dismissed.

To all of which, including the Court's standard of review, the Court hereby notes that Petitioner/Plaintiff excepts and objects and such exceptions and objections are made a part of the record of these civil actions.

Let judgment be entered accordingly.

ENTERED NUNC PRO TUNC THE 3RD DAY OF AUGUST 1995, THIS THE 18th DAY OF SEPTEMBER 1995

s/THOMAS A. BEDELL
Judge of the Circuit Court of
Harrison County

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4. Protective Order,
Entered June 8, 1995

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff,

v. CIVIL ACTION NO. 93-C-792-2

JOHN L. DEPOLO, individually
and as agent for the City of Clarksburg;
P. DOUGLAS GRAY,
individually and as Chairman of the
City of Clarksburg's Code
Enforcement Appeals Board; and
THE CITY OF CLARKSBURG;
Defendants.

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

ELLIS R. LEWIS, Petitioner,

v. CIVIL ACTION NO. 90-C-780-2

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and

THE CITY OF CLARKSBURG, Respondents.

ORDER

On April 5, 1995, the Court entertained oral argument on Defendants'/Respondents' Motions for Protective Order. Plaintiff/Petitioner Ellis R. Lewis, pro se, and Larry Harless, Plaintiff's/Petitioner's counsel, participated by telephone. Defendants/ Respondents appeared by counsel, Leonard A. Costa, Gordon H. Copland, Richard M. Yurko and Jill Oliverio Florio.

The Court, after considering the arguments of counsel, is of the opinion that all discovery in this action should be stayed for a period of six weeks from the date of the hearing. During that period, the Court will rule on pending motions in both actions as well as the subject Motions for Protective Order. In the event that the Court rules that Defendants/Respondents must respond to the discovery requests, the Court will then address the time-frame for which discovery responses must be submitted. Additionally, Defendants/Respondents may assert objections to the individual requests at that time.

Accordingly, it is hereby ORDERED that Defendants' /Respondents' Motions for Protective Order are granted, in part, to the extent that all discovery must be held in abeyance until May 16, 1995. The Court hereby notes the objections and exceptions of each party to the Order.

ENTER: June 8, 1995 s/Thomas A. Bedell

Judge Thomas A. Bedell

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5. Order, Entered May 17, 1995

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff,

v. CIVIL ACTION NO. 93-C-792-2

JOHN L. DEPOLO, individually
and as agent for the City of Clarksburg;
P. DOUGLAS GRAY,
individually and as Chairman of the
City of Clarksburg's Code
Enforcement Appeals Board; and
THE CITY OF CLARKSBURG;
Defendants.

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

ELLIS R. LEWIS,
Petitioner,

v. CIVIL ACTION NO. 90-C-780-2

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG,
Respondents.

ORDER

On May 9, 1995 came plaintiff, Ellis R. Lewis, pro se, and came defendants, John L. DePolo, P. Douglas Gray, as Chairman of the City of Clarksburg's Code Enforcement Appeals Board, and the City of Clarksburg, by their attorneys Richard M. Yurko, Jr. and Jill O. Florio, pursuant to this Court's order scheduling Civil Action No. 93-C-792 for a pretrial conference. During the pretrial conference, the Court noted plaintiff's objection to trying Civil Action No. 93-C-792 before the issues in Civil Action No.

90-C-780-2 had been resolved and advised the parties present that because the two actions were interrelated, the Court's intent was to rule on all dispositive motions at the same time. Although the Court had reviewed the record in both cases, it would not rule unless all parties to the two actions, and their counsel were present.

The Court further advised the parties present that the trial of this case, scheduled to begin during the week of May 22, 1995, would not likely be tried due to the Court's criminal docket. Accordingly, the case would be continued.

Plaintiff then orally moved the Court for an order changing the venue of this action and also asked the Court to recuse itself. The court found both motions to be without merit and denied both motions. The Court did, however, grant plaintiff leave to file written motions, with supporting documentation, seeking a change of venue and/or recusal, such motions to be filed on or before June 9, 1995. Defendants are to file any response memoranda by June 19, 1995.

Plaintiff then asked the Court for a ruling on Defendants' Motion for Protective Order. The Court granted the motion. The Court, however, noted that the motion may be reconsidered at the time the Court rules on the dispositive motions.

Defendants then advised the Court that since the trial of this matter was continued, defendant DePolo would withdraw his motion to permit him to be absent from trial. The Court noted that the motion was withdrawn.

It is, therefore, ORDERED as follows:

1. Civil Action No. 93-C-792 is continued.

2. The Court will hold a hearing on June 23, 1995 for both Civil Action No. 93-C-792 and Civil Action No. 90-C-780-2 at 8:00 a.m., if all attorneys are available, at which time the Court will hear arguments on the various dispositive motions only to the extent that the arguments are new arguments and do not repeat arguments which have already been briefed an/or argued.

3. At the June 23, 1995 hearing, the Court will rule on the

dispositive motions. At that time, the Court will determine what remaining issues will be tried to a jury and will establish a discovery and trial schedule.

4. Plaintiff's oral motions for a change of venue and recusal are DENIED, with plaintiff granted leave to file written motions on or before June 9, 1995. Defendants' responses are due on or before June 19, 1995.

5. Defendants' Motions for Protective Order are GRANTED, and the Court may reconsider these motions depending upon its rulings on June 23, 1995.

6. Defendant DePolo's motion to be absent from trial is withdrawn.

To which ORDER each party's objection is noted.

The Circuit Clerk of Harrison County is directed to send certified copies of the Order to Ellis R. Lewis and all counsel of record in both actions.

ENTER: May 17, 1995

s/T.A. Bedell

Thomas A. Bedell

Circuit Judge

II. OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY OTHER COURTS AND ADMINISTRATIVE AGENCIES

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6. West Virginia Supreme Court of Appeals Rejection of Leave to File Petition for Second Petition for Appeal, Entered May 1, 1997

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 1st day of May, 1997, the following order was made and entered:

Ellis R. Lewis, Petitioner
Below, Petitioner
vs. No. 952463
The BOCA Appeals Board of the
City of Clarksburg, and the City
of Clarksburg, Respondents Below,
Respondents
and
Ellis R. Lewis, Plaintiff Below,
Petitioner
vs.
John L. DePolo, individually and as
agent for the City of Clarksburg; P.
Douglas Gray, individually and as
Chairman of the City of Clarksburg
Code Enforcement Appeals board; and
the City of Clarksburg, Defendants
Below, Respondents

On a former day, to-wit, April 30, 1997, came the petitioner, Ellis R. Lewis, pro se, and presented to the Court his motion in writing to leave to file a second petition for appeal out-of-time in

the above-captioned proceeding, which being seen and inspected by the Court is hereby refused.

A True Copy

Attest: s/ Connie C. Bowling
Connie C. Bowling
Interim Clerk, Supreme Court of Appeals

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7. West Virginia Supreme Court of Appeals Order Petition Refused
February 20, 1997

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of February, 1997, the following order was made and entered:

Ellis R. Lewis, Petitioner
Below, Petitioner
vs.) No.952463
The BOCA Appeals Board of the
City of Clarksburg, and the City
of Clarksburg, Respondents Below,
Respondents
and
Ellis R Lewis, Plaintiff Below,
Petitioner
vs.
John L. DePolo, individually and as
agent for the City of Clarksburg; P.
Douglas Gray, individually and as
Chairman of the City of Clarksburg
Code of Enforcement Appeals Board; and

the City of Clarksburg, Defendants
Below, Respondents

On a former day, to-wit, December 11, 1995, came the petitioner, Ellis R. Lewis, pro se, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Harrison County, rendered on the 3rd day of August, 1995, with the record accompanying the petition. Previously, on the 27th day of November, 1995, came the respondents, John L. DePolo, individually and as agent for the City of Clarksburg; P. Douglas Gray, individually and as Chairman of the City of Clarksburg Code Enforcement Appeals Board; and the City of Clarksburg, by Steptoe & Johnson, Richard M. Yurko, Jr., and Jill Oliverio Florio, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the same day came the respondents, the BOCA Appeals Board of the City of Clarksburg, and the City of Clarksburg, by Dickie, McCamey & Chilcote, and Leonard A. Costa, Jr., and Steptoe & Johnson, Gordon Copland and Jill O. Florio, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justices Cleckley and Albright and Judge Recht, sitting by temporary assignment, participated in this decision. Justices Davis, Starcher and Maynard did not participate in this decision.

A True Copy
Attest: s/ Connie C. Bowling
Connie C. Bowling
Interim Clerk, Supreme Court of

8. West Virginia Supreme Court of Appeals Order to Supplement the Record

May 30, 1996

Ellis R. Lewis, Petitioner Below, Petitioner
vs.) No. 952463
The BOCA Appeals Board of the City of Clarksburg and the City of Clarksburg, Respondents Below, Respondents
AND
Ellis R. Lewis, Plaintiff Below, Petitioner
vs.
John L. DePolo, individually and as agent for the City of Clarksburg; P. Douglas Gray, individually and as Chairman of the City of Clarksburg's Code Enforcement Appeals Board; and the City of Clarksburg, Defendents Below, Respondents

On a former day, to-wit, May 16, 1996, came the appellant, Ellis R. Lewis, pro se, and presented to the Court his motion in writing to supplement the record in this proceeding by allowing the following to be made a part of the record herein: (1) Motion to Dismiss and Answer of Respondents to amended Petition for Appeal of Ellis R. Lewis, Counterclaim and Complaint (7/13/92); (2) Brief of the City of Clarksburg (10/7/93); (3) Letter to Ms. Oliverio and Gentlemen from Judge McCarthy (4/19/94); (4) Return of BOCA Appeals Board Finding and Decision (11/19/91); (5) Statement of Issues of Facts Requiring Resolution by Trier of Facts (11/5/92); (6) Judge McCarthy's Order (7/21/94); (7) Findings and Fact and Conclusions of Law (7/21/94); (8) Order transferring Case 90-C-780-1 (7/21/94); (9) City Clerk's File 9 page (11/2/94) submitted 11/4/94; (10) BOCA Appeal Remand pages 1-25; (11) Boroff to Lewis 5/15/87 (affirms condemnation); (12) Plaintiff's Portion - Pretrial Order 7/13/91, pages 1-30; (13) Exhibit 3: Moore

to Mollohan 2/2/87; (14) Exhibit 4: Lewis to Trecost 6/23/81, Lewis to Boroff 2/25/88, Lewis to Boroff 4/11/88, Lewis to Boroff 10/9/90, Boroff to Bryan 10/11/90 and Lewis to Boroff 10/17/90; and (15) City Clerk's file containing entries dated 2/4/80 through 10/30/91. Thereafter, on the 29th day of May 1996, came the respondents, the BOCA Appeals Board of the City of Clarksburg, the City of Clarksburg, John L. DePolo and P. Douglas Gray, by Dickie, McCamery & Clilcote, and Leonard A. Costa, Jr., and Steptoe & Johnson, Gordon H. Copeland, Richard M. Yurko, Jr. and Jill Oliverio Florio, their attorneys, and presented to the Court their written response thereto objecting to only Nos. 12 and 15 of the petitioner's motion to supplement.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion to supplement with the exception of Nos. 12 and 15 listed above. It is therefore ordered that the (1) Motion to Dismiss and Answer of Respondents to amended Petition for Appeal of Ellis R. Lewis, Counterclaim and Complaint (7/13/92); (2) Brief of the City of Clarksburg (10/7/93); (3) Letter to Ms. Oliverio and Gentlemen from Judge McCarthy (4/19/94); (4) Return of BOCA Appeals Board Finding and Decision (11/19/91); (5) Statement of Issues of Facts Requiring Resolution by Trier of Facts (11/5/92); (6) Judge McCarthy's Order (7/21/94); (7) Findings and Fact and Conclusions of Law (7/21/94); (8) Order transferring Case 90-C-780-1 (7/21/94); (9) City Clerk's File 9 page (11/2/94) submitted 11/4/94; (10) BOCA Appeal Remand pages 1-25; (11) Boroff to Lewis 5/15/87 (affirms condemnation); (12) Exhibit 3: Moore to Mollohan 2/2/87; and (13) Exhibit 4: Lewis to Trecost 6/23/81, Lewis to Boroff 2/25/88, Lewis to Boroff 4/11/88, Lewis to Boroff 10/9/90, Boroff to Bryan 10/11/90 and Lewis to Boroff 10/17/90, be made a part of the record in this proceeding.

A True Copy

Attest: s/Ancel G. Ramey
Clerk, Supreme Court of Appeals

9. Harrison County Circuit Court Order Prospective, Declaratory and Injunctive Relief, Entered July 21, 1994

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner, NO. 90-C-780-1

vs.

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

ORDER

On the 3rd day of September, 1993, this Court ordered Petitioner, Ellis R. Lewis, and Respondents, the BOCA Appeals Board of the City of Clarksburg and the City of Clarksburg, to submit memorandum of law regarding the issue of "[w]hether the City of Clarksburg may, under any circumstances, obtain prospective declaratory or injunctive relief requiring a property owner to undertake an affirmative act to demolish a building?" Thereafter, the parties submitted to the Court briefs on this issue arguing their respective positions.

The Court, after carefully considering the pleadings, exhibits and memoranda of law, is of the opinion, for the reasons stated in its Findings of Facts and Conclusions of Law, which is made a part of this Order by reference, that the above issue should be answered affirmatively.

It is, therefore, ORDERED and ADJUDGED that the City has the authority to obtain prospective declaratory or injunctive relief requiring Petitioner Lewis to undertake an affirmative act to demolish the subject structure located on Monticello Avenue, upon a finding by this Court that the alleged defects in the proceedings afforded Petitioner by the BOCA Appeals Board were not material nor prejudicial to Petitioner. Should Petitioner fail to demolish the building at that time, the City may undertake the demolition of the

building after seeking judgment against the Petitioner in this Court for the full cost of the demolition.

To all of which the Court hereby notes that Petitioner excepts and objects and that such exceptions and objections are made a part of the record of this civil action.

Let judgment be entered accordingly.

ENTER July 21, 1994

s/ DANIEL L. MCCARTHY
Judge Daniel L. McCarthy,
Judge of the Circuit Court of
Harrison County

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10. Harrison County Circuit Court, Findings of Fact and Conclusions of Law, Entered July 21, 1994

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner, NO. 90-C-780-1

vs.

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

FINDINGS OF FACTS
AND CONCLUSIONS OF LAW

On the third day of September, 1993, came Petitioner, Ellis R. Lewis, in person and by his counsel, Larry Harless, and the BOCA Appeals Board of the City of Clarksburg (the "Board") and the City of Clarksburg (the "City"), by and their counsel, John L. DePolo and Jeffrey A. Holmstrand, for a Status Conference. At that time, the Court ordered that the parties submit memorandum of

law addressing the issue:

Whether the City of Clarksburg may, under any circumstances, obtain prospective declaratory or injunctive relief requiring a property owner to undertake an affirmative act to demolish a building?

Pursuant to the Court's Order, the parties submitted memorandum of law on this issue. Upon consideration of the memoranda, as well as the pleadings and exhibits filed in this action, the Court makes the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACTS

1. Petitioner owns a building at 272-300 Monticello Avenue, which is within the limits of the City of Clarksburg.

2. Following the flood in 1985, the City of Clarksburg inspected the building and thereafter condemned it, primarily because of structural damage.

3. The City issued a condemnation letter to Petitioner on May 23, 1986.

4. As a result of further deterioration, the City issued a demolition order with respect to the subject property on or about August 3, 1990.

5. Petitioner has failed to demolish the structure and he refuses to accept any financial responsibility for the demolition.

AND CONCLUSIONS OF LAW

1. The City of Clarksburg, pursuant to Section 8-12-16 of the West Virginia Code and Section 1725.02(f of the Codified Ordinances of the City of Clarksburg, has the authority to order demolition of the dwellings or buildings that are unfit for human habitation.

2. The City, therefore, after determining that Petitioner's building was in a state of disrepair and deterioration, had the authority to order that the building be demolished.

3. With respect to the costs for the removal and demolition of the building, Section 8-12-16 of the West Virginia Code provides a court with discretion in determining how costs will be imposed,

with this discretion being limited only by the scope of judicial remedies available to municipalities.

4. In addition to the powers conferred upon municipalities by the Constitution of the State and other general laws, Section 8-12-5 of the West Virginia Code provides municipalities with plenary power to take "appropriate action" with respect to ordinances or resolutions.

5. Municipalities exercise only those powers expressly granted by statute or charter, but they may also exercise those powers that are necessary or fairly implied in or incident to powers expressly granted, and those powers essential to carrying out the declared objects and purposes of the municipal corporation.

6. Consequently, the costs of the demolition of the subject building, which the City has the authority to order, may be imposed upon the Petitioner because indemnification for such costs is a right that can be implied from Section 8-12-16 of the West Virginia Code.

7. Finally, Section 8-11-1 of the West Virginia Code provides the City with the authority to file a civil action against Petitioner to obtain declaratory or injunctive relief.

8. Thus, pursuant to the above authorities, the City has the right to obtain prospective declaratory or injunctive relief requiring a property owner to undertake an affirmative act to demolish a building. If the property owner fails to do so, the City may undertake the demolition of the building and seek judgment against the property owner for the full costs associated with the City's demolition of the structure, prior to the actual demolition.

ENTER July 21, 1994

s/DANIEL L. MCCARTHY

Judge Daniel L. McCarthy,
Judge of the Circuit Court of
Harrison County

11. Harrison County Circuit Court Order Regarding City's Right to Demolish Building and Institute Criminal Proceedings, Entered June 12, 1992

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner, NO. 90-C-780-1

vs.

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

ORDER

On a previous day came the parties for a status conference in the above-styled case. The parties' agreement is and it is ORDERED as follows:

1. The City of Clarksburg has full power and authority, at any time hereafter, to demolish or cause to be demolished the property of Ellis Lewis, at 272-300 Monticello Avenue, and to sell all salvage material in such a way that they deem best, and record a lien against the subject property for all costs involving the demolition of this building and the removal up of the remaining debris, without waiving any other claims the City may have against Ellis R. Lewis;
2. The City of Clarksburg agrees to give the attorney for the petitioner ten (10) days' written notice, prior to any attempt to institute criminal proceedings against Ellis R. Lewis;
3. The Petitioner Ellis Lewis has ten days to amend his pleadings filed in this case; the City thereafter has twenty days to respond;
4. A pre-trial conference is hereby tentatively scheduled for the first day of July, 1992, at 11:00 a.m.
5. A copy of this Order shall be mailed by the Circuit Clerk to all attorneys of record.

ENTER: June 12, 1992

s/ JUDGE: DANIEL MCCARTHY

12. DECISION OF THE BOCA APPEALS BOARD OF THE CITY OF CLARKSBURG NOVEMBER 6, 1991

RE: ELLIS R. LEWIS
Petitioner

vs. Harrison County Circuit Court

THE BOCA APPEALS BOARD OF THE CITY OF CLARKSBURG; and THE CITY OF CLARKSBURG No. 90-C-780-1

DECISION OF THE BOCA APPEALS BOARD OF THE CITY OF CLARKSBURG

Pursuant to Judge Daniel McCarthy's Order of June 11, 1991 where in he ordered among other matters that the BOCA Appeals Board... shall conduct further proceedings with due notice to petitioner 1) to make written findings sufficient to satisfy procedural requirements 2) to rule on petitioner's request for a modification of the Order Appeal from after receiving evidence related to the modification request only the BOCA Appeals Board makes the following finding:

1. September 12, 1990 and October 3, 1990, a public hearing was held in the Ellis R. Lewis case relating to the City of Clarksburg's Order served on Ellis Lewis on August 8, 1990 that Ellis Lewis raze and remove and do other things to and relating to his structure at 272-300 Monticello Avenue because it was in violation of the City's Building Code within 20 days 8-8-90.
2. Ellis Lewis appealed this Order to the BOCA Appeals Board.
3. The BOCA Appeals Board conducted a public hearing with due notice to all parties.
4. At the conclusion of the public hearing and after taking evidence from all parties the BOCA Appeals Board decision on October --, 1990 that "the appellant (E. R. Lewis) be given 30 days to begin the demolition of the building at 272-300 Monticello Avenue and then another 120 days to complete the demolition.
5. Mr. E. R. Lewis has never complied with this decision.

6. E. R. Lewis filed an appeal in Harrison County Circuit Court Civil Action No. 90-C-780-1 and Judge McCarthy found that the BOCA Board did not make findings of fact and did not rule on E. R. Lewis' motion to modify and the case was sent back to us pursuant to this order.

7. On AUGUST 13, 1991 the BOCA Appeals Board made it's findings of fact (see Exhibit A attached hereto and made a part hereof).

8. On OCTOBER 7, 1991 & OCTOBER 30 the BOCA Appeals Board considered R. R. Lewis request to modify the decision after receiving evidence and with due notice to all parties.

9. Mr. E. R. Lewis pleaded that he was a possible a Bankruptcy candidate and that he could not afford to tear it down; and he agreed to submit a verified financial statement to the Board.
(and the Board delayed their decision for this statement and they found it reasonable to request it).

10. This (No. 9) was reasonable; But Mr. E. R. Lewis refused to make his financial statement to the Board because it would have to be made a matter of public record.

11. E. R. Lewis stated that the building must be torn down; But he stated if he had 5 million dollars he would not tear it down (October 3, 1991 hearing).

12. The Demolition Order Without Option to Repair issued to Appellant Lewis in connection with his property located at 272-300 Monticello Avenue, Clarksburg, West Virginia. Was proper and should be affirmed.

13. We have concluded that the city was with authority to act in issuing the Order, and did so properly. This is not in contention by Appellant Lewis.

14. The BOCA Appeals Board held hearings on October 7th and October 30th, 1991. The Board provided all parties the right to present testimony and evidence in support of their respective positions. No party raised objection to the procedures, nor their having a full and fair hearing. *See attached transcript of hearings.

15. The City does possess the proper authority to issue such

demolition order.

16. Appellant, and the City agree to the fact that said property is in poor condition and should be removed.

17. The BOCA Board therefore reaffirms the City's Demolition Order without option to repair and it's prior decision of October 4, 1990 based upon the finding of fact attached hereto as Exhibit B.

18. It is further the decision of the BOCA Board that, although E. R. Lewis is required by this decision to demolish his structure at 272-300 Monticello Ave. and remove the debris forthwith, immediately as of the date of this decision, the City shall not fine or imprison him for his non compliance until after April 2, 1992.

Dated NOVEMBER 6, 1991

s/ Douglas Gray

s/ Joey Paugh

s/--------

****

EXHIBIT "B"

DATE OCTOBER 4, 1990

TO: Mr. E. R. Lewis, Appellant
P.O. Box 286
Clarksburg, WV 26301

APPEAL DISPOSITION

Please be notified that a PUBLIC HEARING was held on September 12, 1990 and October 3, 1990 with the Appellant being present, without representation of legal counsel for the Appellant. A quorum of the Clarksburg B.O.C.A. EXISTING STRUCTURE APPEALS BOARD being constituted that day, and upon the receipt of all evidence in regard to the matter of the Appeal of

E.R. Lewis
P.O. Box 286
Clarksburg, WV 26301
Name of Appellant
ADDRESS

it is the decision of the Appeals Board that:
The appellant be given 30 days to begin the demolition of the building at 272-300 Monticello Avenue and then another 120 days to complete the demolition.
Based on the Findings of the Appeals Board as hereinafter indicated:
PLEASE LOOK AT PAGE 7 OF THE DEMOLITION ORDER FOR YOUR RIGHT TO APPEAL FOR AN INJUNCTION.
ATTEST s/Donna Dolan
Secretary, Appeals Board
CHAIRMAN, CLARKSBURG B.O.C.A.
EXISTING STRUCTURE APPEALS BOARD
****

EXHIBIT "A"
AUGUST 13, 1991
FINDING OF FACT FOR THE APPEALS BOARD
The Demolition Order Without Option to Repair issued to Mr. Ellis R. Lewis in connection with his property located at 227-300 Monticello Avenue, Clarksburg, West Virginia was proper and should be affirmed because the building is in violation of the following Sections of Article 3, General Requirements, of the BOCA National Property Maintenance Code/ 1990
1. PM-302.3 Reason: All porch landings, pillars, and supports are rotten.
2. PM-302.4 Reason: Cracks and breaks are within the foundation walls
3. PM-302.5 Reason: Siding is missing.
4. PM-302.6 Reason: The roof leaks and gutters need replaced.
5. PM-302.7 Reason: Rotted lumber and eaves need replaced.
6. PM-302.11 Reason: All windows are broken out and doors dysfunctioned and rotted

It is further found that all the conditions, statements and violations of the Demolition Order Without Option to repair attached hereto as Exhibit A concerning Mr. Lewis's property are found valid and were sustained by the evidence.

** REASON 7. The BOCA Board of Appeals will not allow the City to pursue any fines or imprisonment until after April 2, 1992.

** (as amended by BOCA Board on October 30, 1991)

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13. **Harrison County Circuit Court, Remand Order, Entered June 11, 1991**

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner,

vs. No. 90-C-780-1

THE BOCA APPEALS BOARD OF THE CITY OF CLARKSBURG; and THE CITY OF CLARKSBURG

Respondents.

ORDER

This matter came on for pre-trial conference on May 20, 1991. The petitioner was present in person and by his counsel Tom Rodd; the respondent by its counsel John DePolo.

The Court discussed the status of the case with the parties, and it appeared that two procedural issues raised in the petition might be resolved by a remand. Thereupon, petitioner's counsel made an oral motion to remand the case to the BOCA appeals board for further proceedings related to the issues; and the respondent waived prior notice of said motion. Upon consideration thereof, the Court did order that this matter is remanded to the

BOCA appeals board, which shall within ninety (90) days of entry of this order conduct further proceedings, with due notice to petitioner; (1) to make written findings sufficient to satisfy procedural requirements; and (2) to issue a ruling on petitioner's request for a modification of the order appealed from, after receiving evidence related to the modification request only.

It was reported to the Court, by the Clarksburg City Engineer, that the Petitioner's property does not pose an imminent danger of collapse, but may present a danger if there is unauthorized entry. Petitioner represented to the Court and Respondent did not contest that the building was presently boarded up and otherwise secure. The parties agreed that if the Respondent should desire to take some action with respect to Petitioner's property, it shall give at least three days notice to Petitioner or his counsel, unless an emergency situation precludes such notice. All parties agreed that the property should be demolished.

This matter shall remain upon the docket of this Court; both parties are reserved their rights to file further pleadings and objections, following compliance with the foregoing order by the Respondent.

The Clerk shall transmit a copy of this order to counsel of record.

So ORDERED.

ENTER: June 11, 1991

s/Daniel McCarthy

Honorable Daniel McCarthy

14. Demolition Order
August 9, 1990
CITY OF CLARKSBURG, WEST VIRGINIA
BUILDING COMMISSION

DEMOLITION ORDER
WITHOUT OPTION TO REPAIR
TO OWNER

YOU ARE HEREBY NOTIFIED. PURSUANT TO ARTICLE 1725 AS AMENDED, OF THE CODIFIED ORDINANCES OF CITY OF CLARKSBURG, AND LAWS OF THE STATE OF WEST VIRGINIA, THAT THE BUILDING, STRUCTURE, AND/OR PROPERTY LOCATED AT 272-300 Monticello Avenue, Tax Map 24 Parcels 322, 323, 336, 35, 367, 399, 415, 432, 4 Clarksburg, WV IN THE CITY OF CLARKSBURG, COUNTY OF HARRISON, THE STATE OF WEST VIRGINIA, WAS INSPECTED ON THE 3 DAY OF August, 1990, AND FOUND TO BE IN VIOLATION OF THE AFORESAID ORDINANCE OF THE CITY OF CLARKSBURG...

THEREFORE, THE CLARKSBURG BUILDING COMMISSION DETERMINES THAT:

1. THE STRUCTURE DESCRIBED ABOVE IS SO OLD, DILAPIDATED, AND/OR HAS BECOME SO OUT OF REPAIR AS TO BE DANGEROUS, UNSAFE, UNSANITARY OR OTHERWISE UNFIT FOR HUMAN HABITATION, OCCUPANCY OR USE, AND IT WOULD BE UNREASONABLE TO REPAIR THE SAME.
2. THE COST OF REPAIRS NECESSARY TO CORRECT CODE VIOLATIONS WOULD EXCEED 100% OF THE CURRENT VALUE OF THE STRUCTURE.

OTHER:

...IT IS UNLAWFUL FOR THE OWNER TO SELL,

TRANSFER, MORTGAGE, LEASE, OR OTHERWISE DISPOSE OF THE CITED PROPERTY, UNLESS OR UNTIL FULL COMPLIANCE WITH SECTION ES-1107.5 OF THE BOCA BASIC/NATIONAL EXISTING STRUCTURES CODE IS MET...

FAILURE TO COMPLY WITH THIS ORDER WITHIN THE PRESCRIBED TIME WILL RESULT IN THE CITY OF CLARKSBURG CAUSING THE STRUCTURE TO BE DEMOLISHED AND THE COST OF SUCH DEMOLITION RAZING, REMOVAL AND ANY OTHER APPROPRIATE ACTIONS TAKEN THEREWITH TO BE ENTERED AS A LIEN AGAINST THE REAL ESTATE UPON WHICH SUCH COSTS WERE INCURRED.

IN ADDITION TO ANY OTHER REMEDIES, PENALTIES, PROCEDURES, AND/OR CONSEQUENCES SET FORTH IN THIS ORDER OR OTHERWISE PROVIDED BY LAW, FAILURE TO COMPLY WITH THE REQUIREMENTS OF THIS ORDER MAY SUBJECT THE VIOLATOR TO A FINE OF NOT LESS THAN ONE HUNDRED DOLLARS ($100.00) NOR MORE THAN FIVE HUNDRED DOLLARS ($500.00) OR IMPRISONMENT FOR A TERM NOT TO EXCEED THIRTY (30) DAYS FOR EACH DAY THE VIOLATION CONTINUES...

THE BUILDING COMMISSION OF
THE CITY OF CLARKSBURG
s/ BY: Robert Bryan
CODE OFFICIAL

15. Condemnation Notice

City of Clarksburg Department of Public Works
May 23, 1986
To: Mr. Ellis Lewis
From: Paul F. Veltri, Director of Engineering
RE: Property situate 272-300 Monticello Avenue

CONDEMNATION NOTICE

Dear Mr. Lewis:

This is to inform you that the subject property owned by you and involved in the recent flood of November 5, 1985 has been determined by this department to be unrepairable and condemned as stipulated in the Codified Ordinances of the City of Clarksburg by Article 1747, Sec. 1747.09, Existing Structures in Identified Flood-prone Areas.

Further, the estimated cost of renovation of the involved property as submitted by WYK Associates. Inc. in the amount of $200,000.00 and the Certified Appraisers, Inc. report of July 22, 1982, listing the Market Value of $301,600.00 support our findings in determining the condemnation.

If we can be of assistance to you, please do not hesitate to call upon us.

Very truly yours,
s/PAUL F. VELTRI
Paul F. Veltri
Director of Engineering

III. CONSTITUTIONAL PROVISIONS

16. U.S. Constitutional Amendments

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

ARTICLE XIV

Passed by Congress June 16, 1866. Ratified July 23, 1868.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of that State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV. STATUTES, ORDINANCES AND REGULATIONS

17. West Virginia Code
Rules of Civil Procedure

Rule 56. Summary Judgment. (a) *For claimant.* - A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* - A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* - The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* - If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall

further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* - Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* - Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 57. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgment Act, Code chapter 55, article 13 [§ 55-13-1 et seq.], shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39.

18. WEST VIRGINIA CODE
CHAPTER 29A.
STATE ADMINISTRATIVE

18. WEST VIRGINIA CODE
CHAPTER 29A.
STATE ADMINISTRATIVE PROCEDURES ACT.

§ 29A-5-4. Judicial Review of contested cases.

(a) Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter, but nothing in this chapter shall be deemed to prevent other means of review, redress or relief provided by law.

...

(e) Appeals taken on questions of law, fact or both, shall be heard upon assignment of error filed in the cause or set out in the briefs of the appellant Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or argued. The court or judge shall fix a date and time for the hearing on the petition, but such hearing, unless by agreement of the parties, shall not be held sooner than ten days after the filing of the petition, and notice of such date and time shall be forthwith given to the agency.

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions decision or order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory or jurisdiction of the agency;

or (3) Made upon unlawful procedures; or
(4) Affected by other error of law; or
(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one [§ 29A-6-1], article six of this chapter.

(1964, c. 1.)

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19. West Virginia Constitution
Article 3, § 10

Safeguard for Life, Liberty and Property

§ 10. No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

Article 3, § 17

Courts Open to All-Justice Administered Speedily

§ 17. The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall not be administered without sale, denial or delay.

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20. Clarksburg Ordinances

ARTICLE 1725
Building Inspector

1725.03 (c) The building inspector shall keep comprehensive records... (d) All records shall be open to public inspection for good and sufficient reasons at the stated office hours, but shall not be removed from the office of the building inspector without his written consent.

ARTICLE 1747
Flood Control

1747.6 ENFORCEMENT

(a) Notices. Whenever the Building Inspector or other authorized Municipal representative determines that there are reasonable grounds to believe that there has been a violation of any provisions of this ordinance, or of any regulations adopted pursuant thereto, such authority shall give notice of such alleged violation as hereinafter provided. Such notice shall:

(1) Be in writing;

(2) Include a statement of the reasons for its issuance;

(3) Allow a reasonable time for the performance of any act it requires;

(4) Be served upon the property owner of his agent as the case may require; provided, however, that such notice or order shall be deemed to have been properly served upon such owner or agent when a copy thereof has been served upon such owner or agent (sic) when a copy thereof has been served with such notice by any other method authorized or required by the laws of this State; and

(5) Contain an outline of remedial action which, if taken, will effect compliance with the provisions of this article, or

any part thereof, and with the regulations adopted pursuant thereto.

1747.9 EXISTING STRUCTURES IN IDENTIFIED FLOOD-PRONE AREAS.

Structures existing in any identified flood-prone area prior to the enactment of this article, but which are not in compliance with these provisions, may continue to remain subject to the following:

(a) Any modification, alteration, reconstruction or improvement of any kind to an existing structure, to an extent or amount of less than fifty percent of its market value, shall be elevated and/or flood-proofed to the greatest extent possible.

(b) Any modification, alteration, reconstruction or improvement of any kind to an existing structure, to an extent or amount of fifty percent or more of its market value, shall be undertaken only in full compliance with the provisions of this article.

(c) Existing structures located in any designated floodway area shall not be expanded or enlarged, unless the effect of the proposed expansion or enlargement on flood heights is fully offset by accompanying improvements.

(Ord. 78-1. Passed 2-2-78.)

1747.11 APPEALS

(a) Any person aggrieved by an action or decision of the Building Inspector, or by any of the requirements of this article, may appeal to the Board of Zoning Appeals...

21. CLARKSBURG MAINTENANCE CODE APPEALS BOARD

BYLAWS

ARTICLE II

Purposes and Powers

Section 1. This Board was organized for the purpose of hearing and determining appeals from decisions of the Clarksburg Building Commission or its authorized Code official made while enforcing the provisions of the BOCA Basic Property Maintenance Code 1978.

Section 2. This Board has all the powers conferred upon such Board by any provision of the West Virginia Code as amended, or conferred by it by ordinances enacted on Second and Final Reading by the Clarksburg City Council on October 5, 1978, September 5, 1979, and Frbruary (sic) 7, 1978, and all powers incidental convenient or necessary for carrying out any of the purposes and powers set forth in the above referenced statutes and ordinances.

ARTICLE III

Membership

Section 1. This Board shall consist of five persons, who shall be known as the Clarksburg Maintenance Code Appeals Board. The members of the Board shall be residents Clarksburg, and electors and shall be appointed by the Clarksburg City Manager. One member of the Board shall have at least two years experience in real estate, and property management. One member of the Board shall have at least three years experience as a registered architect or some other professional service. One member of the Board shall be a person who has rented his home for at least two years, and one member of the Board shall have owned his home for at least two years.

Section 2. The Clarksburg City Manager may appoint one alternate member to the Board, but such member shall vote only when a member of the Board refuses to vote because of said

members(sic) personal interests or when a member is absent.

Section 3. The members shall be appointed for...

ARTICLE IV

Meeting of the Members

Section 2-A. All regular and special meetings of the Board shall be open to the public. The Board, public and the news media shall be advised of the time and place of all regular meetings and the time, place and purpose of all special meetings, in advance thereof, by posting on the bulletin board located in the office of the Clarksburg City Engineer, at least seven (7) days in advance of any regular meeting, five (5) days in advance of any special meeting, written notice setting forth the aforesaid information provided, however, that the foregoing notice shall not be required in the event of an emergency requiring immediate official action. None of the foregoing shall be constructed to prevent the Board from holding an executive session during a regular, special or emergency meeting, after the presiding officer has identified the authorization therefore under the provisions of Chapter 6, Article 9A, Section 4 of the Code and so advised the governing body and general public in attendance. No decision shall be made in such executive session.

ARTICLE VI

Duties of the Officers

Section 3. ... All Board minutes are deemed public records, and the Secretary shall make available such minutes for public inspection within a reasonable time after meetings...

ARTICLE VI

Rules of Procedure

Section 1. Appeals. Appeals to the property Maintenance Code Appeals Board for Harrison County shall be taken by filing a written petition, on a form designated by the Board, with the Secretary of the Board, at 227 W. Pike Street, Clarksburg, West Virginia. The Secretary shall mark each Petition, upon filing, with the date it is filed and the date of service of the Notice and Order.

Section 3. The Hearing. A hearing shall be held on all appeals. The appellant may state concisely the basis for the appeal and may present such other matter as he/she desires. Every party shall have the right to present his/her case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Any oral or documentary evidence may be received, but the Chairman may exclude irrelevant, immaterial or unduly repetitive evidence. All hearings and discussions by the Board shall be open to the public. Members of the Board may question the appellant or other witnesses at any time.

Section 4. The Decision by the Board. The decision by the Board shall be effective and final immediately upon the day the Board decides the appeal...

Section 5. Records. The Secretary shall prepare an agenda for each meeting of the Board. The Secretary shall maintain a permanent record of the activity of the Board. The record shall include all original Petitions, all decisions appealed, all agendas, all minutes of Board meetings, and all decisions of the Board. Any party may have the proceedings during a hearing stenographically reported, at his/her own expense; provided, however, that the original of any transcript of a hearing shall be filed with the Secretary of the Board, immediately upon transcription, and shall become a portion of the original record of the Board.

Section 6. Right to Counsel. Every party shall have the right to be accompanied, represented and advised by counsel. Every party shall be accorded the right to appear in person or by or with counsel...

V. PLACES IN THE SUIT OR BRIEFS WHERE CONSTITUTIONAL ISSUES ARE RAISED

22. Petition for Appeal - Supreme Court, West Virginia

October 25, 1995

THE BOCA APPEALS BOARD OF	CIRCUIT COURT
THE CITY OF CLARKSBURG; and	No. 90-C-780-2
THE CITY OF CLARKSBURG,	No. 93-C-792-2

PETITION FOR APPEAL

V. Argument, A: ...Proceeding were Defective...

14. THE City of Clarksburg had a duty to maintain the integrity of the building's foundation, and is therefore estopped from asserting claims against Lewis flowing from foundation failure, and the Condemnation and Demolition Orders.

a. On January 20, 1959, THE SANITARY BOARD OF THE CITY OF CLARKSBURG and THE CITY OF CLARKSBURG obtained a right-of-way from the property owners for construction and installation of sanitary sewers (DB 817/203, Adm. Rec.), which provided...

c. The right-of-way agreement also contains an express provision and City duty to maintain the integrity of the building's foundation into the future....

d. The right-of-way agreement was included in Lewis' BOCA APPEAL REMAND as an exhibit.

15. THE City's installation of and/or failure to maintain storm & sanitary sewers at the site contributed to the soil conditions and rupture of the foundation.

a. As referenced in Lewis' BOCA APPEAL REMAND submitted to the Board, the City was on notice that storm drainage was damaging the Monticello building...

b. The City's failure to maintain and correct a known encroachment and trespass upon petitioner's property preclude their claims set forth in the demolition order, and make the City liable to Lewis for damages...

c. The City is also liable for damages resulting from soil flows or increased lateral pressures...

...the United States Supreme Court has set a clear standard for requiring compensation when a public body denies a property owner temporary use of property, a standard long held applicable to permanent denials of property rights. First Evangelical Lutheran v LA County 96 L.Ed.2d 250 (1987)....

Justice Holmes, writing for the Supreme Court, considered the protections afforded by the Fifth and Fourteenth Amendments...

..."We are in danger ... a shorter cut than the constitutional way of paying for it." Id. at 326.

It was this same desire to improve the public condition which initiated passage of the City of Clarksburg's federally mandated ordinance (Public Law 93-234), (Id. 1747.02), and the subsequent condemnation of Lewis' property. Condemnation and extinction of Lewis' property rights under Ordinance 1747, an ordinance benefiting other persons and the community, requires just compensation under the State Constitution...

... the City also condemned Lewis' property under a "cost of repair" ordinance, Ordinance 1747.09, and prohibited repair. The subsequent demolition order ... contained no provision or possibility for bringing the building into compliance. The City's Condemnation and Demolition Orders... constitute a taking.

The Horton court also addressed the issue of whether funds were available to the city, holding:

> The fact that the city does not have available, or has not appropriated... funds ... does not confer upon the city the power to take it for destruction without compensation. (Id. at 890).

A statute or ordinance may be valid in broad scope, and at the same time be arbitrary and unreasonable in its application to a particular property. (Carter v. Bluefield, 54 S.E.2d 747 (1949)). To make valid a city ordinance, it should not admit of an opportunity for the exercise of arbitrary discrimination by the municipal

authorities between citizens similarly situated....

The City of Clarksburg's application of its ordinances..., and subsequent enforcement proceedings are clearly dissimilar from applications of those statutes and ordinances to other similar properties and property owners.

> "... Power granted to a municipality is not power to destroy. [if] A reviewing tribunal could not determine whether each citizen was treated equally and fairly. Such an ordinance is uniformly held void (State v. City of Phillipi, 136 W.Va. 120, 65 S.E.2d 713 (1951)).

B. ... Summary Judgment...

...Obviously, the difference between the respective standards for motions to dismiss under WVRCP 12(b)(6) and motions for summary judgment under the WVRCP 56 in this state is so significant and distinct that the improper application of the latter to an unprevailing party is inherently unfair and prejudicial. Here, of course, neither the plaintiff, nor for that matter the defendants, were aware that any claim or issue in this action was ever on a "summary judgment track".

...they exclusively relied upon legal and factual assertions in their voluminous briefs, none of which, of course, is proper grist for the "summary judgment" mill...

There simply has been no showing that the federal court ruled on the merits of claims asserted in the federal case #88-105-C(k), which may also be reflected in the pending cases.

In 1992 the Supreme Court of West Virginia again affirmed the standard applicable to res judicata and collateral estoppel and reversed the circuit court holding:

> `[W]here the causes of action are not the same, the parties being identical or in privity, the bar extends only to those matters which were actually litigated in the former proceeding...State ex. rel. Hamrick v. LCS Services, syl. pt. 2, 414 SE2d 620 (WVSC 1992)...

Respectfully submitted,

s/E.R. Lewis
Ellis R. Lewis, pro se

on the 25th day of October 1995

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23. "BOCA" BRIEF
October 6, 1994
NO. 90 C 780 2

THE CITY HAD A DUTY TO COLLECT AND MAINTAIN PROPERTY RECORDS; THE BREACH OF THAT DUTY DENIED PETITIONER LEWIS DUE PROCESS UNDER THE W. VA. CONST., ART. III, § 10, AND THE DOCUMENTS TO DEFEND AGAINST THE CITY'S CLAIMS.

... (c) The building inspector shall keep comprehensive records of applications, of permits issued, of certificates issued, of inspections made, of reports rendered and of notices or orders issued. He shall retain file copies of required plans and all documents relating to building work so long as any part of the building or structure to which they may relate may be in existence.

(d) All records shall be open to public inspection for good and sufficient reasons at the stated office hours, but shall not be removed from the office of the building inspector without his written consent. (Clarksburg Ord. 1725.03(c))

It is undisputed that Engineering Department files regarding the Monticello building were removed or destroyed. The City has repeatedly denied Lewis' efforts to obtain documents.

THE CITY OF CLARKSBURG HAD A DUTY TO MAINTAIN THE INTEGRITY OF THE BUILDING'S FOUNDATION, AND IS THEREFORE ESTOPPED FROM ASSERTING CLAIMS AGAINST LEWIS FLOWING FROM FOUNDATION FAILURE, AND THE CONDEMNATION AND DEMOLITION

ORDERS.

On January 20, 1959, THE SANITARY BOARD OF THE CITY OF CLARKSBURG and THE CITY OF CLARKSBURG obtained a right-of-way from the property owners for construction and installation of sanitary sewers (DB 817/203, Adm. Rec.), which provided...

The City thereafter, pursuant to a change order, constructed a combination sewer within four feet of and parallel to the "concrete structures". The combination sewer passed completely under the structure, bisected the building's foundation in two places, and connected an existing sanitary and storm sewer main in Monticello Avenue to the new sewer main.

The right-of-way agreement also contains an express provision and City duty to maintain the integrity of the building's foundation into the future...

The right-of-way agreement was included in Lewis' BOCA APPEAL REMAND as an exhibit.

THE CITY'S INSTALLATION OF AND/OR FAILURE TO MAINTAIN STORM & SANITARY SEWERS AT THE SITE CONTRIBUTED TO THE SOIL CONDITIONS AND RUPTURE OF THE FOUNDATION.

As referenced in Lewis' BOCA APPEAL REMAND submitted to the Board, the City was on notice that storm drainage was damaging the Monticello building:

> A 27 unit rowhouse is located on the 300 block of Monticello Avenue... storm water from Thompson and Denham Streets is collected at Cove Court and is discharged onto Monticello Avenue by way of Robinson Lane. This uncontrolled storm water is threatening the foundation of the building and the retaining walls on the creek side of the road which support the road. (FY84 CDBG pg. 54)

The City's failure to maintain and correct a known encroachment and trespass upon petitioner's property precludes their

claims set forth in the demolition order, and make the City liable to Lewis for damages.

A municipality is liable if it collects surface or other water in sewers or drains and deposits it either immediately or by force of gravity onto to land of another. (MCQUILLIAN - MUNICIPAL CORPORATIONS § 31.24 SURFACE WATER)

The City is also liable for damages resulting from soil flows or increased lateral pressures. (MCQUILLIAN - MUNICIPAL CORPORATIONS § 32.37 INJURY TO LATERAL SUPPORT, Kunst v. Grafton 67 S.E. 74 (W. Va. 1910).

THE CITY'S ACTIONS CONSTITUTE A TAKING UNDER THE WEST VIRGINIA CONSTITUTION.

While only a State Constitutional violation is alleged here, the United States Supreme Court has set a clear standard for requiring compensation when a public body denies a property owner temporary use of property, a standard long held applicable to permanent denials of property rights. First Evangelical Lutheran v LA County 96 L.Ed.2d 250 (1987)

The West Virginia Supreme Court in Kingman Valley Public Serv. v. Riverview, 386 S.E.2d 485, while denying compensation to a property owner required to connect to a public utility, expressly identifies First Evangelical as authority for compensable "takings" in the context of zoning regulations. This the State Supreme Court doubtlessly would incorporate the First Evangelical rationale into our State Constitution solely relied upon here.

Justice Holmes, writing for the Supreme Court, considered the protections afforded by the Fifth and Fourteenth Amendments, opining:

> The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made for the 14th Amendment.... Pennsylvania Coal Co. v. Mahon (1922).

Addressing the question of regulations restricting the use of private property, Justice Holmes wrote:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for it. Id. at 326.

It was this same desire to improve the public condition which initiated passage of the City of Clarksburg's federally mandated ordinance (Public Law 93-234), (Id. 1747.02), and the subsequent condemnation of Lewis' property. Condemnation and extinction of Lewis' property rights under Ordinance 1747, an ordinance benefiting other persons and the community, requires just compensation under the State Constitution.

In a North Carolina case with facts strikingly similar, the North Carolina Supreme Court considered the question of whether a city, pursuant to a cost of repair ordinance and a finding that the structure was unfit for human habitation, could demolish the building without paying compensation to the owner.

... The subsequent demolition order, titled "DEMOLITION ORDER WITHOUT OPTION TO REPAIR", contained no provision or possibility for bringing the building into compliance. The City's Condemnation and Demolition Orders, as applied to Lewis and his property, constitute a taking.

A statute or ordinance may be valid in broad scope, and at the same time be arbitrary and unreasonable in its application to a particular property. (Carter v. Bluefield, 54 S.E.2d 747 (1949)). To make valid a city ordinance, it should not admit of an opportunity for the exercise of arbitrary discrimination by the municipal authorities between citizens similarly situated.

> "Notwithstanding express power may exist to enact [an ordinance], the ordinance must provide a uniform rule of action; it must contain permanent legal provisions, operating generally and impartially, for its enforcement cannot be left to the will or unregulated discretion of the municipal

authorities or any officer of the corporation." McQuillian on Munic. Corp. § 728. (Lynch v. Town of Northview, 75 W.Va. 609, 81 S.E. 833 (1914)).

The City of Clarksburg's application of its ordinances to Lewis and his properties, and subsequent enforcement proceedings are clearly dissimilar from applications of those statutes and ordinances to other similar properties and property owners. The West Virginia Supreme Court addressed such inequities as follows:

"Under the ordinance the council could grant the permit to one applicant and, in the same circumstances, withhold it from another. Sole discretion is attempted to be vested in the city council, which it may exercise in the interest of a favored applicant or against the interest of an unfavored one. The value of the property of one citizen could be diminished or destroyed to the advantage of another property owner. Power granted to a municipality is not power to destroy. A reviewing tribunal could not determine whether each citizen was treated equally and fairly. Such an ordinance is uniformly held void (State v. City of Phillipi, 136 W.Va. 120, 65 S.E.2d 713 (1951)).

Lewis asked the City to issue a demolition order (the Small Business Administration had demanded a demolition order). The City's refusal to issue the order frustrated and prevented appropriate timely demolition of the Monticello building at no cost to the City. ...their own acts and omissions which prevented Lewis from performing the demolition in the first instance.

Four years after condemnation, and after an unsuccessful bank effort to rescind the condemnation order, the City finally issued its demolition order. The doctrine of laches should preclude, in this case, any effort by the City to seek fines, imprisonment, or reimbursement of costs or any other sanctions...

6th day of October, 1994

by Counsel

s/Larry Harless

24. Plaintiff's Amended Complaint
July 7, 1994

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff,

v. CIVIL NO. 93-C-792-2

JOHN L. DEPOLO, individually and as agent for the City of Clarksburg;

P. DOUGLAS GRAY, individually and as Chairman of the City of Clarksburg's Code Enforcement Appeals Board; and

THE CITY OF CLARKSBURG, Defendants.

PLAINTIFF'S AMENDED COMPLAINT

1. The Plaintiff, Ellis R. Lewis is a resident of the County of Riverside, State of California, with business interests and real estate located in the City of Clarksburg, Harrison County, West Virginia, which real estate and business interests were at all times relevant, the subject matter of this action.
2. Defendant John L. DePolo (hereinafter DePolo) is a resident of Harrison County with a private law practice and also is employed as legal counsel for the City of Clarksburg.
3. Defendant P. Douglas Gray (hereinafter Gray) is a resident of Harrison County and during all times relevant has acted as Chairman of the City of Clarksburg's BOCA Code Enforcement Appeals Board (hereinafter Board). The Board is a component of and agent for the City of Clarksburg.
4. Defendant City of Clarksburg (hereinafter City) is a municipal corporation located in Harrison County, West Virginia.
5. The Plaintiff Lewis, at all relevant times, was the owner, among others, of two parcels of real property, one being 272-300 Monticello Avenue, (hereinafter Monticello property) and the other being 390-392 College Street (College property) in the City of Clarksburg.
6. The plaintiff also had at all material times a liberty interest

protected by the due process clause of the West Virginia Constitution, Article III, Section 10.

7. Plaintiff Lewis had a property interest in the Monticello apartments, at all times material here, protected by the West Virginia Constitution, Article III, Section 10.
8. The City, May 23, 1986, issued a Condemnation Order against Plaintiff Lewis' Monticello property pursuant to its Flood Plain Ordinance Section 1747.09.
9. On or about August 3, 1990, the City issued a Demolition Order Without Option to Repair against plaintiff's property at 272-300 Monticello Avenue.
10. As provided by the Order, Plaintiff Lewis timely filed with the Board an appeal objecting to that Order.
11. An appeal hearing by the Board was held September 12, 1990, and continued until October 3, 1990.
12. An Appeal Disposition, dated October 4, 1990, was issued, and on October 22, 1990 Lewis filed a timely appeal No. 90-C-780-1 of the Board disposition, in the Circuit Court of Harrison County, West Virginia.
13. An agreed order dated June 6, 1991 in said circuit court appeal remanded the case to the Board for further proceedings.
14. On October 24, 1992 the property at College Street was sold at a Trustee's Sale.
15. On November 23, 1992 the Monticello property, subject of the BOCA code enforcement action and Appeal 90-C-780-1, was sold at a Tax Sale.
16. The improper acts of the defendants, as set forth hereinafter, evidence an pattern of improper and illegal actions constituting continuing tortious and other wrongful conduct.
17. The improper acts of the defendants, as set forth hereinafter, have damaged the plaintiff fiscally and emotionally because the defendants have held plaintiff up to scorn and derision in his community, and have foreclosed opportunities which the plaintiff would otherwise have had to earn a livelihood, to gainfully

conduct his economic affairs and to enjoy the vocational standing that he otherwise would have.

18. The Defendants acted deliberately, willfully, recklessly, and negligently by permitting and/or directing the acts alleged hereinafter.

COUNT I

LEWIS v. DEPOLO

19. The allegations contained in paragraphs 1-18 are incorporated herein by reference thereto.

20. Defendant DePolo met secretly on or about June 10, 1986 with his friend, FirstBank stockholder and bank board officer Frank Abruzzino, esq., and with bank vice-president Larry Poe.

21. Defendant DePolo agreed to cooperate with FirstBank's actions which were contrary to express provisions of the adopted ordinances of the City.

22. At a pre-trial hearing before the Circuit Court on May 20, 1991, of Plaintiff Lewis' appeal of the Board's adverse ruling, Defendant DePolo conclusively admitted to Judge Daniel McCarthy, the plaintiff, and plaintiff's counsel Tom Rodd that the City was seeking "no jail time", but only fines.

23. By letter dated July 11, 1991 plaintiff's counsel Tom Rodd advised the City he would be unavailable for scheduled Board hearings until after August 20, 1991.

24. At a July 18, 1991 Board meeting, without Plaintiff Lewis or his counsel present, and prior to hearing evidence required by the court's remand order, Defendant DePolo submitted Proposed Findings For The Appeals Board. The Board voted to continue the meeting until August 13, 1991.

25. At an August 13, 1991 Board meeting Defendant DePolo testified at length before the meeting was formally called to order, and urged the Board to adopt his proposed findings.

26. Thereafter the meeting was called to order and the Board adopted the findings prepared by DePolo.

27. During subsequent October 7, 1991 remanded deliberations of

the Board, defendant DePolo repeatedly testified and urged the Board to reject Lewis' appeal request that the Board not empower the City to seek fines and incarceration.

28. At an October 30, 1991 meeting, after the Board had voted unanimously to eliminate fines and criminal penalties, Defendant DePolo argued repeatedly and at length urging the Board to reconsider said order.

29. After the Defendant DePolo's repeated urgings, the Board took a second vote and did change its previous decision, and upon continued pressure from Defendant DePolo took a third vote.

30. Defendant Depolo prepared an order and findings for the Board, submitted them to the Board for entry, and argued at length, at a November 6, 1991 meeting called to approve the minutes of the October 30, 1991 Board meeting.

31. The order and findings, as submitted by Defendant Depolo, were inconsistent with the record.

32. Defendant DePolo's acts and/or omissions were done with malicious purpose, in bad faith, and in a wanton or reckless manner.

33. Defendant DePolo's conduct was a malicious attempt to usurp the Board's proper deliberations and was motivated by animus. By the foregoing conduct, DePolo, acting as agent of the City and individually, retaliated against the plaintiff in violation of his rights to petition courts and other tribunals for the redress of grievances within the meaning of the West Virginia Constitution, Article III, Section 17, and violated the plaintiff's rights to procedural and substantive due process of law under the West Virginia Constitution, Article III, Section 10, in that such actions denied the plaintiff an impartial tribunal and other required procedural safeguards, and were arbitrary, capricious, and unreasonable.

34. With leave of the court, Plaintiff Lewis filed an Amended Petition for Appeal from the Board's findings of fact on June 24, 1992 alleging improper and illegal acts by the City and

Defendant DePolo.

35. In response to plaintiff's Petition, Defendant DePolo filed July 13, 1992 a Motion to Dismiss and an Answer to the Amended Petition for Appeal, and a Counterclaim and Complaint for Declaratory Judgement against Plaintiff Lewis for $160,000.00.
36. The declaratory judgement claim amount of $160,000 was unsupported by any evidence presented to the court, or to the Board below.
37. On September 30, 1992 Plaintiff Lewis filed his Motion to Dismiss, Answer, Counterclaim, Motion for Leave to Amend, and Response to the City's Counterclaim and Complaint for Declaratory Judgement.
38. After more than twelve months, no response to the plaintiff's September 30, 1992 counterclaim has been filed by Defendant DePolo, demonstrating malicious purpose, bad faith, and/or a wanton or reckless manner.
39. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant DePolo in such amounts as may be appropriate.

COUNT II
LEWIS v. GRAY

40. The allegations contained in paragraphs 1-39 are incorporated herein by reference thereto.
41. The Final Decision of the Board was contrary to the evidence submitted, and inconsistent with the record.
42. The Board failed to afford plaintiff his due process rights under the West Virginia Constitution Article III Section 10, by failing to file with the record on appeal in Case No. 90-D-780-1 exhibits filed by plaintiff with the Board.
43. The Board failed to process Lewis' Administrative Appeal in accordance with legal requirements that appellant Lewis have opportunity to cross examine adverse witnesses testifying before

the Board.

44. The Board failed in its affirmative duty as an administrative agency performing quasi-judicial functions to dispose promptly of matters properly submitted to it.

45. The Board under Article III sections 10 and 17 of the West Virginia Constitution and other laws had a mandatory duty to hold adjudicatory hearings within 180 days, and to issue final orders within one year, from the date of filing of the appeal, to determine if probable cause existed for substantiating the allegations of the code enforcement order.

46. Board Chairman Doug Gray failed to oversee the deliberations of the Board in conformity with the By-Laws of the Board and Plaintiff Lewis' constitutionally guaranteed rights to due process and equal protection of the law.

47. The Appeals Board as constituted to hear the appeal was in violation of City Ordinance 86-17, BOCA Code 1721.04(d), and Article III, Section 1 of the Board By-Laws.

48. The Board held hearings on matters at issue without Lewis' presence, and considered evidence which was improperly submitted and irrelevant.

49. The proceedings of the Board which resulted in the decision to fine and imprison Lewis, denied plaintiff constitutional due process of law and violated equal protection under the law, in violation of the West Virginia Constitution Article III Section 10, and were arbitrary, capricious, unreasonable, and discriminatory as to the plaintiff.

50. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant Gray in such amounts as may be appropriate.

COUNT III

LEWIS v. CITY

51. The allegations contained in paragraphs 1-50 are incorporated herein by reference thereto.

52. The City, acting by and through the City Manager, City

Engineering Officials and Defendant DePolo, have attempted to coerce Lewis by repeatedly threatening Lewis with arrest.

53. The attempts at coercion were made to avoid legal duties of the City and/or to deny Lewis his legal rights as guaranteed by the State of West Virginia.

54. City officials violated plaintiff's constitutional rights under the West Virginia Constitution, Article III, Sections 10 and 17, by making false and improper statements in the public record and before administrative boards about Plaintiff Lewis for the purpose of further coercing plaintiff to abandon his pursuit of his constitutionally protected rights, and to prejudice the Board.

55. The City has engaged in a pattern of malicious, retaliatory prosecution of Plaintiff Lewis by:

(a) the initial issuance August 9, 1990 of its Demolition Order without Option to Repair;

(b) failure to timely process Lewis' Administrative Appeal in accordance with legal requirements that appellant Lewis have opportunity to cross examine adverse witnesses testifying before the Board;

(c) filing of the City's Complaint and Declaratory Judgement action;

(d) failure to file an answer to Lewis' Counterclaim.

56. The aforementioned actions of the City, acting by and through the City Manager, City Engineering Officials and City Defendant DePolo, were brought and pursued for the purpose of interfering with and denying Plaintiff Lewis the economic and time resources to seek redress of grievances through courts and other tribunals under the West Virginia Constitution, Article III, Sections 10 and 17, and otherwise.

57. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT IV

LEWIS v. CITY

58. The allegations contained in paragraphs 1-57 are incorporated herein by reference thereto.
59. The City's May 23, 1986 Condemnation Order issued against Plaintiff's Monticello property was consistent with City Ordinance 1747.09.
60. The City thereafter failed to follow the procedural requirements of Ordinance 1747 et. seq. for persons aggrieved by enforcement of the Ordinance.
61. City official's statements and assurances thereafter provided to bank officers and to officials of the United States Small Business Administration were contrary to law and adopted City ordinances.
62. The improper City acts and omissions have denied Lewis economically viable use and have completely eliminated the economic value of the property.
63. The City's improper application of its ordinances to the plaintiff's property, and other improper acts and omissions give rise to a cause of action for **inverse condemnation**.
64. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT V

LEWIS v. CITY

65. The allegations contained in paragraphs 1-64 are incorporated herein by reference thereto.
66. The City, through its Sanitary Board, entered into a Right of Way Agreement (hereinafter Agreement), recorded in Deed Book 817 page 203, with plaintiff's predecessor in title for the installation of a sanitary sewer.
67. The sanitary sewer was installed between the Monticello building's foundation and adjoining Elk Creek.
68. The sanitary sewer as installed also passed completely under the Monticello structure in an east to west direction.
69. Said Agreement provided that the sewer be installed ten feet or

more from certain foundation supports of the Monticello building.

70. The sewer lines, as installed pursuant to the plans and specifications and a subsequent change order, encroached upon the ten foot minimum setback.

71. The improperly installed sanitary sewer contributed to the structural failure of the building's foundation.

72. Plaintiff was denied his full use and enjoyment of the Monticello property.

73. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT VI

LEWIS v. CITY

74. The allegations contained in paragraphs 1-73 are incorporated herein by reference thereto.

75. The Agreement also provided for the City's continuing responsibility and duty for the integrity of the Monticello building's foundation into the future.

76. Plaintiff Lewis notified the City of his concerns about damage to the building's foundation on several occasions.

77. Although aware of foundation damage, the City failed to fulfill its contractual obligations.

78. Plaintiff was denied his full use and enjoyment of the Monticello property.

79. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT VII

LEWIS v. CITY

80. The allegations contained in paragraphs 1-79 are incorporated herein by reference thereto.

81. The City constructed a storm sewer which collected surface water over several blocks near the Monticello property.

82. The storm sewer discharged the collected waters at an artificial location above and directed toward the Monticello property and adjoining Monticello Avenue.
83. Plaintiff Lewis notified the City of his concerns about damage to the building's foundation from flow of collected water across and beneath Monticello Avenue.
84. Although aware of foundation damage, the City failed to fulfill its duty to properly install and maintain the storm sewer.
85. The City's acts and omissions were a continuing trespass to plaintiff's property each time it rained.
86. Plaintiff was denied his full use and enjoyment of the Monticello property.
87. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT VIII

LEWIS v. CITY

88. The allegations contained in paragraphs 1-87 are incorporated herein by reference thereto.
89. The City's Engineering Department had a legal duty to collect and maintain records related to the Monticello property.
90. City personnel removed and/or destroyed the city engineering files on Lewis' properties, which would have demonstrated whether any previous condemnation type actions had been contemplated, and any enforcement actions taken with the property, and would generally set forth the complete history of the Monticello property.
91. City files on Lewis' 312 rehabilitation loan application, his rental rehabilitation program application, and all related documentation over a five-year period have been removed and/or destroyed by City personnel, or others.
92. The Defendant City's aforementioned conduct has the consequences and legal effects of fraudulent acts.
93. As proximate results of the defendants' foregoing misconduct

and continuing course of tortious and wrongful conduct toward the plaintiff, the plaintiff has incurred pecuniary, property, and liberty losses; emotional distress, and mental anguish; diminished capacity to enjoy life; diminished personal and vocational standing and reputation; and other harms and losses.

94. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT IX

LEWIS v. CITY

95. The allegations contained in paragraphs 1-94 of plaintiff's Complaint are incorporated herein by reference thereto.

96. The plaintiff Ellis Lewis was owner of improved real estate in the City of Clarksburg (hereinafter City) located at 333 Jarvis Street.

97. The City issued a code enforcement order against the Jarvis Street building denying occupancy until all cited repairs were completed.

98. Successors in title were permitted to rent the building without making the repairs and improvements required by the code enforcement order.

99. The City's acts violated Lewis' rights to equal protection under the West Virginia Constitution, Article III, Section 10; and by such retaliation and discrimination under Article III Section 17.

100. WHEREFORE, plaintiff requests that judgement for compensatory and punitive damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

COUNT X

LEWIS v. CITY

101. The allegations contained in paragraphs 1-94 of plaintiff's Complaint, and paragraphs 95-100 of this Amended Complaint are incorporated herein by reference thereto.

102. The plaintiff Ellis Lewis was owner of, or had an interest in, improved real estate in the City of Clarksburg located at

390-392 College Street.

103. The City issued a code enforcement order against the College Street building denying occupancy until all cited repairs were completed.

104. At the request of City officials, the West Virginia State Fire Marshall also issued a code enforcement order against the College Street building denying occupancy until all cited repairs were completed.

105. Successors in title were permitted to make alterations to the building without making the repairs and improvements required by the code enforcement orders and pre-conditions for occupancy demanded of Lewis and prior owner Carl M. Schaffer.

106. The City's acts violated Lewis' rights to equal protection under the West Virginia Constitution, Article III, Section 10, and by such retaliation and discrimination under Article III Section 17.

107. WHEREFORE, plaintiff requests that judgement for damages be entered in favor of plaintiff and against Defendant City in such amounts as may be appropriate.

PRAYER

WHEREFORE, petitioner asks that this court:

(a) void the City's demolition order;

(b) dismiss the City's Complaint and demand for Declaratory Judgement;

(c) grant judgement for compensatory damages against the defendants as appropriate;

(d) grant judgement for punitive damages against the defendants as appropriate;

(e) grant such other relief as may be proper and just;

(f) grant judgement against the defendants in the amount of $5,000,000.

(g) permanently enjoin the defendants from continuing their aforesaid and similar acts and omissions of misconduct against the plaintiff, and from seeking monetary payments from

plaintiff;

(h) award petitioner his costs and attorney fees;

Plaintiff seeks trial by jury on all issues so triable and requests an advisory jury otherwise.

Respectfully submitted,
s/ E.R. Lewis
Ellis R. Lewis, pro se

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25. PLAINTIFF'S RESPONSE TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

December 22, 1993

CIVIL NO. 93-C-792-2

II. COUNTERSTATEMENT OF FACTS

...2. The City has acknowledged the need to correct its storm sewer by allocating funds and letting a contract to install new drainage lines to direct the flow away from the damaged building.

3. The storm sewer repair was terminated because the City feared additional damage to Lewis' building would result from removal of subsurface rock. (Shulte at 45)

4. City of Clarksburg has never repaired or replaced the offending pipelines, and the damage continues.

...16. The defendants' Brief in Support of Motion to Dismiss fails to address the inverse condemnation claim set forth in Count IV.

C. Lewis' Claims are Not Barred by the Doctrine of Collateral Estoppel.

There simply has been no showing that the federal court ruled on the merits of claims asserted in the federal case #88-105-C(k), which may also be reflected in the pending cases.

In 1992 the supreme court of West Virginia again affirmed the standard applicable to res judicata and collateral estoppel and reversed the circuit court holding:

'[W]here the causes of action are not the same, the parties

> being identical or in privity, the bar extends only to those matters which were actually litigated in the former proceeding... and arises by way of estoppel rather than by way of strict res adjudicata.' State ex. rel. *Hamrick v. LCS Services*, syl. pt. 2, 414 SE2d 620 (WVSC 1992)

E. Counts V - VII are not Barred by Statutes of Limitations

...In a case with strikingly similar facts, the Supreme Court of West Virginia reversed the Harrison County Circuit Court's dismissal based upon the statute of limitations. The alleged damages resulted from a leaking water line, and continued over a period of several years. The court ruled as follows:

> ...it is clear that the damages did not occur all at once but increased as time progressed: each injury being a new wrong. "[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious overt acts cease." 54 C.J.S. Limitations of Action § 169 (1948), (citations omitted), Handley v. Town of Shinnston, 169 WV 617, 289 SE2d 201, 202 (WVSC 1982).

The town of Shinnston first repaired, and finally removed the source of the damaging waters six years after the plaintiffs first complained of damage. Suit was filed less than two years after the water line was removed. In the present case the City of Clarksburg has never repaired or replaced the offending pipelines, and the damage continues.

The City has acknowledged the need to correct its storm sewer by allocating funds and letting a contract to install new drainage lines to direct the flow away from the damaged building. The project was terminated because the City feared additional damage to Lewis' building would result from removal of subsurface rock. (Shulte at 45)...

W.Va.Code, 55-2-17 [1931] however, tolls the running of the statute of limitations in certain circumstances, including the common law doctrine tolling the statute of limitations when the

defendant has fraudulently concealed the cause of action...

Any word or act tending to suppress the truth will be enough to constitute fraudulent concealment, and the court stated:

> [T]his court holds that the general statute of limitations, W.Va.Code, 55-2-12, as amended, is tolled, with respect to an undiscovered wrongdoer, by virtue of the fraudulent concealment or obstruction of prosecution doctrine embodied in W.Va.Code, 55-2-17...
>
> Tolling of the statute of limitations with respect to an undiscovered wrongdoer is especially appropriate in a case in which, as part of the cover-up, the injured person is impeded in discovering the identity of the wrongdoer in question by the invocation of governmental secrecy. (Sattler v. Bailey 400 S.E. 2d 220, 229 (WVSC 1990)

The City of Clarksburg repeatedly, and continuing to the present, has refused to provide to this plaintiff documents which would disclose the evidence of the tortious and/or contract claims asserted. Refusal by the City to respond to F.O.I.A. requests, failure to retain documents, and removal of files regarding properties owned by Lewis, all evidence the cover-up. Concealment is a continuation of the original wrong. Mathews v. Dale, 118 WV 303, 190 SE 338 (1937)

Judge Copenhaver applied WV Code 55-2-17 in a bankruptcy case involving notes by corporation directors. The defendants claimed both indemnification and the bar of the statute of limitations. In ruling against them the Court cited 1A Corbin, Contracts § 197 (1963) as follows:

> Whether there has been fraudulent intent or not, it would be scandalous not to enforce the note, if otherwise any depositor or creditor would be a loser. Justification for such enforcement can be phrased in terms of "estoppel" or in terms of the action in reliance by various parties. In any case there has been no consideration in the sense of a bargained for equivalent. In some cases the court has been content to

> rest its decision against the promisor on a mere appeal to the prevailing beliefs as to a public body. Duttine v. Savas, 455 FS 153, 158 (SDWV 1978)

Concluding that the tolling of the statute by the application of WV Code § 55-2-17 is an equitable solution to what would otherwise be an unjust and harsh result. Judge Copenhaver ruled:

> In general, the court may exercise its equitable jurisdiction and apply the doctrine of estoppel under appropriate facts to preclude a defendant from utilizing the statute of limitations as a bar, even in the absence of an express statutory basis for tolling the period. (emphasis added) (Id. at 161)
>
> It has also been held that a fraud, once committed, is a continuing thing, precluding the defendant from pleading the statute of limitations. 43 ALR3d Statute of Limitations--Estoppel § 4(a) at 441.
>
> ...This court should reject the defendants motion for dismissal of this complaint.
>
> Respectfully submitted,
> s/ E.R. Lewis
> Ellis R. Lewis, pro se

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26. PETITIONER'S RESPONSE TO PREEMPTIVE INDEMNIFICATION BRIEF

November 5, 1993

NO. 90 C 780 1

PETITIONER'S RESPONSE

B. ARGUMENT

The City cites statutory provisions of the West Virginia Code and Ordinances of the City of Clarksburg which explicitly provide a remedy if the owner fails to comply with the municipality's code enforcement action. That remedy "shall be a lien against the real property upon which such costs were incurred." (W.Va. Code 8-16-12, and Codified Ordinances of the City of Clarksburg

Section 1725.02(f)) (Exhibit B)...

The Virginia court considered a city ordinance which permitted uncompensated destruction of an owner's property upon findings that the building was unfit for human habitation and that cost of repair would exceed 50% of the value of the structure. The Court ruled the ordinance unconstitutional and void. (Horne v. City of Cordele, 230 SE2d 333).

In a North Carolina case with facts strikingly similar, the North Carolina Supreme Court considered the question of whether a city, pursuant to a cost of repair ordinance and a finding that the structure was unfit for human habitation, could demolish the building without paying compensation to the owner.

We hold that the city may not do so [condemn without just compensation] under the circumstances of this case.

> ...petitioner has made no specific proposal to the city for the repair of his house. However, the order served upon him and the ordinance upon which it rests do not offer him that alternative to demolition of the building. (Horton v. Gulledge, 277 NC 353, 177 SE2d 885, 890 (1970)).

In the present case, the City also condemned Lewis' property under a "cost of repair" ordinance, Ordinance 1747.09, and prohibited repair. The subsequent demolition order, titled "DEMOLITION ORDER WITHOUT OPTION TO REPAIR", contained no provision or possibility for bringing the building into compliance. The City's Condemnation and Demolition Orders, as applied to Lewis and his property, constitute a taking.

The Horton court also addressed the issue of whether funds were available to the city, holding:

> The fact that the city does not have available, or has not appropriated... funds for purchasing the property, or for taking it by eminent domain, does not confer upon the city the power to take it for destruction without compensation. (Id. at 890).

The Horton court, quoting the United States Supreme Court, said:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Id. at 891).

It was this same desire to improve the public condition which initiated passage of the City of Clarksburg's federally mandated ordinance (Public Law 93-234), (Id. 1747.02), and the subsequent condemnation of Lewis' property. Condemnation and extinction of Lewis' property rights under Ordinance 1747, an ordinance benefiting other persons and the community, requires just compensation.

The condemnation order was defective and voidable to the extent the order failed to contain the requisite language defining what Lewis needed to do for compliance, and failed to provide an opportunity to bring the structure into compliance with the City building code and flood plain ordinance (Id. 1747.06(a)(1)).

A statute or ordinance may be valid in broad scope, and at the same time be arbitrary and unreasonable in its application to a particular property. (Carter v. Bluefield, 132 WV 609, 54 SE2d 747 (1949)). To make valid a city ordinance, it should not admit of an opportunity for the exercise of arbitrary discrimination by the municipal authorities between citizens similarly situated.

> "Notwithstanding express power may exist to enact [an ordinance], the ordinance must provide a uniform rule of action; it must contain permanent legal provisions, operating generally and impartially, for its enforcement cannot be left to the will or unregulated discretion of the municipal authorities or any officer of the corporation." McQuillian on Munic. Corp. § 728. (Lynch v. Town of Northview, 75 WV 609, 81 SE 833 (1914)).

The City of Clarksburg's application of its ordinances to Lewis and his properties, and subsequent enforcement proceedings are clearly dissimilar from applications of those statutes and ordinances to other similar properties and property owners. The West Virginia Supreme Court addressed such inequities as follows:

"Under the ordinance the council could grant the permit to one applicant and, in the same circumstances, withhold it from another. Sole discretion is attempted to be vested in the city council, which it may exercise in the interest of a favored applicant or against the interest of an unfavored one. The value of the property of one citizen could be diminished or destroyed to the advantage of another property owner. Power granted to a municipality is not power to destroy. A reviewing tribunal could not determine whether each citizen was treated equally and fairly. Such an ordinance is uniformly held void (State v. City of Phillipi, 136 WV 120, 65 SE2d 713 (1951)).

Lewis asked the City to issue a demolition order (the Small Business Administration had demanded a demolition order). The City's refusal to issue the order frustrated and prevented appropriate timely demolition of the Monticello building at no cost to the City. The City should not now be heard to complain about costs of demolition, when it was their own acts and omissions which prevented Lewis from performing the demolition in the first instance.

Four years after condemnation, and after an unsuccessful bank effort to rescind the condemnation order, the City finally issued its demolition order. The doctrine of laches should preclude, in this case, any effort by the City to seek fines, imprisonment, or reimbursement of costs, prospective or otherwise.

C. CONCLUSION

Having failed to comply with the just compensation requirements of state and federal constitutions, the City now brings its complaint and declaratory judgement claims in an effort to convert its just compensation duties into a preemptive indemnification by the property owner Lewis. The City cites no express enabling statute. The City's cited cases, Maxey and Sheldon, maintain the Hyre standard and require two additional threshold requirements. The power sought must also be "indispensable", not merely convenient, and there can be no reasonable doubt as to whether the

municipality y is possessed of that power.

Respectfully submitted,
s/ E.R. Lewis
Ellis R. Lewis, pro se

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27. Statement of Issues
October 26, 1992

IN THE : CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner,
v. NO. 90 C 780-1
THE BOCA A APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG, Respondents.

STATEMENT OF ISSUES

Pursuant to the Court's Status Conference Order of September 10, 1992, Petitioner/Defendant Ellis Lewis sets forth the following as issues which he contends may require resolution by a trier of fact, depending upon the court's resolution of the pending Petitioner's Motion to Dismiss and Motion for Leave to Amend:

...8. Whether the proceedings of the Board which resulted in the decision as revised twice at the urgings of the City's counsel, denied Petitioner constitutional due process of law and violated proper legal procedures.

...14. Whether the demolition order issued on about August 3, 1990 was modified by a bona fide vote of the BOCA Appeals Board.

15. Whether the petitioner Ellis Lewis is unable to comply with the order as a result of acts by City officials and others.

...18. Whether Petitioner attempted to salvage and demolish the building from 1986 to 1988. Whether a demolition order was denied by city officials. Whether there were salvageable materials

sufficient to offset or mitigate the cost of demolition...

...20. Whether the BOCA Appeals Board failed to properly comply with the remand order in that the record does not include materials submitted in support of petitioner's request for modification of the order, as demonstrated by the record.

21. Whether the City's actions are and have been arbitrary, capricious, and an abuse of discretion.

22. Whether the City's failure to comply with enacted ordinances requiring formal appeal procedures for parties aggrieved or objecting to the May 23, 1986 condemnation violated petitioner's rights.

...28. Whether the city engineering department's demolition program is and has been violative of correct legal procedures by...

...30. Whether the city comes to this dispute with unclean hands because of violations by City officials of City Ordinances before and after the initial 1986 condemnation of this building.

31. Whether City officials have refused to consider or apply for available federal funds which could have been utilized for demolition of the Monticello structure.

32. Whether since May of 1986, and continuing to date, officials and agents of the City of Clarksburg have illegally connived and collaborated with other parties to frustrate and prevent the demolition of this building; which actions have caused the petitioner enormous expenses, losses, and to suffer emotional distress, and denial of his state constitutionally guaranteed rights.

33. Whether the conduct of the City of Clarksburg, from the time from approximately June 1986 to present time has violated the rights of Ellis Lewis to legitimately and properly take care of and conduct his business and property, including but not limited to his obtaining legal and entitled-to funding for demolition, and obtaining a replacement property; which conduct denied him substantive and procedural due process of law and equal protection of the laws under the West Virginia Constitution, and has constituted abuse of process and denial of rights under the West Virginia Constitution Article III, Section 17, with the result that he has been gravely

injured financially.

...43. Whether City personnel removed and/or destroyed the city engineering files on Lewis' properties...

...46. Whether the actions described violated petitioner's rights under the Constitution of West Virginia to due process of law, and breached the duties owed to petitioner as a citizen, and as a person who placed special trust and reliance upon the City's actions, including relying upon them to support those positions which they had legally taken with respect to the condemnation, and to adhere to their own policies and practices under the City's ordinances and laws. Whether, in addition, the foregoing special relationship between the petitioner constituted a fiduciary relation, and a contractual relation, whereby the City expressly promised to Lewis to adhere to and assist him in his attempts of recovering from his flood damages, and where the City offered Lewis professional expertise in the area of rehabilitation of property, and Lewis relied to his detriment on the same.

47. Whether the City is by its misconduct estopped from making any claim against plaintiff for demolition costs, or any other costs associated with the building, because of the City's failure to properly implement the flood plain ordinances and building codes related thereto including flood insurance provisions. Whether moreover, the City encouraged plaintiff and supported him in his rehab and repair activities. Whether Lewis relied on the City's expertise and invested large sums of time and money, of which he has now been deprived. Whether, because the City may have acted improperly in encouraging or permitting said rehab, the City should now be estopped from making any claim to Lewis for the demolition of the building.

48. Whether the City was and is responsible for the integrity of the buildings upper retaining wall and foundation.

49. Whether the City's installation of and/or failure to maintain storm & sanitary sewers at the site contributed to the soil conditions and condition of the building's foundation.

50. Whether the City's street widening increased the load upon the building's upper retaining wall.

51. Whether City-approved improper fill in the flood plain increased flood levels which affected the building.

52. Whether the City failed to properly administer the RRP and SCBG grants contributing to the loss of funds for the 1984-86 proposed building rehabilitation. Whether had said rehabilitation been timely completed, flood insurance would have repaired flood damage or demolished the building.

53. Whether since issuance of the May 1986 condemnation order, petitioner Lewis made repeated requests that the City issue a demolition order, and has continued efforts to resolve this conflict.

54. Whether the City currently has unallocated funds sufficient to demolish the building.

55. Whether Federal disaster funds were available to the city when the condemnation order was issued, and at subsequent dates additional state and federal funds, for the express purpose of demolishing flood damaged properties.

56. Whether petitioner has suffered damages, and what damages do the City and other parties owe Petitioner, as a result of the City's conduct complained of in Petitioner's Counterclaim?

Respectfully submitted,
Petitioner by counsel,
s/Tom Rodd

Tom Rodd

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28. Counterclaim and Response to Complaint for Declaratory Judgment
September 29, 1992

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner,

v. NO. 90 C 780-1

THE BOCA APPEALS BOARD OF
THE CITY OF CLARKSBURG; and
THE CITY OF CLARKSBURG,

Respondents.

PETITIONER'S MOTION TO DISMISS, ANSWER, COUNTERCLAIM, MOTION FOR LEAVE TO AMEND, AND RESPONSE TO NUMBERED PARAGRAPHS OF CITY'S COUNTERCLAIM AND COMPLAINT FOR DECLARATORY JUDGEMENT

B. MOTION TO DISMISS, DEFENSES, AND COUNTERCLAIM TO CITY'S DECLARATORY JUDGEMENT ACTION

...27. The City's actions are and have been arbitrary, capricious, and an abuse of discretion....

39. The City's counterclaim for declaratory judgement fails to state a claim.

40. This is not proper case for declaratory judgement.

...42. The counterclaim is barred by the doctrines of laches, collateral estoppel, ripeness, waiver, exclusivity of remedies, the statute of limitations, unclean hands, and estoppel.

43. The conduct of the City of Clarksburg, from the time from approximately June 1986 to present time has violated the rights of Ellis Lewis to legitimately and properly take care of and conduct his business and property, including obtaining legal funding for demolition, and obtaining a replacement property; which conduct denied him substantive and procedural due process of law and equal protection of the laws under the West Virginia Constitution, and have

constituted abuse of process and denial of rights under the West Virginia Constitution Article III, Section 17 with the result that he has been gravely injured financially...

C. MOTION FOR LEAVE TO AMEND TO ADD OTHER PARTIES

45. In the event that the court allows the declaratory judgement counterclaim filed on July 13, 1992, for the first time asserting a claim for monetary damages by the City of Clarksburg against Ellis Lewis, then Ellis Lewis asks for leave to amend to file a Third Party Complaint against FirstBank of Shinnston, Lanny Doerr, Carleton Wood, and WYK Associates, Inc., asserting inter alia their liability for any costs of demolition claimed to be owed to the City of Clarksburg by Ellis Lewis, as a result of their wrongful acts and omissions which resulted in the building not being demolished in a timely fashion....

Respectfully submitted,
Petitioner by counsel,
s/Tom Rodd
Tom Rodd

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29. Amended Petition for Appeal
June 24, 1992

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Petitioner,

v. NO. 90 C-780-1

THE BOCA APPEALS BOARD OF THE CITY OF CLARKSBURG; and THE CITY OF CLARKSBURG,

Respondents.

AMENDED PETITION FOR APPEAL

PROCEDURAL HISTORY

1. On or about August 3, 1990, the City of Clarksburg issued

a Demolition Order Without Option to Repair...

GROUNDS FOR APPEAL

14. The proceedings of the Board which resulted in the decision as revised twice at the urgings of the City's counsel, denied Petitioner constitutional due process of law and violated proper legal procedures.

15. The Final Decision of the Board, as revised twice at the City's Counsel's urgings, was contrary to the evidence in the record taken as a whole.

16. The record as filed by the Board with this Court is incomplete because it does not include exhibits filed by petitioner with the Board.

17. The Appeals Board as constituted to hear the appeal was in violation of the BOCA Basic/National Building Code 1721.04(d) ...

18. The City is by its illegal and inequitable conduct reflected in the record including all matters incorporated by reference from ordering against Ellis Lewis, other than by taking a lien on said property for its own efforts at demolition, any personal responsibility or liability for demolition, or any penalties resulting from failure to demolish said building.

WHEREFORE, petitioner asks that this court either void, remand or modify the referenced demolition order, and award petitioner his costs and attorney fees. Petitioner asks for a trial by jury on all issues so triable.

Respectfully submitted,
Ellis R. Lewis, by Counsel,
s/ Tom Rodd
Tom Rodd

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30. MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO SET ASIDE BOCA APPEALS BOARD ORDER

October 22, 1990

The Clarksburg Maintenance Code (BOCA) Appeals Board hearings of 9/12/90 and 10/3/90 were contrary to the Board's By-Laws, improper and voidable.

The City of Clarksburg, by its improper acts, is estopped from asserting financial claims and/or criminal sanctions against petitioner E. R. Lewis.

The BOCA Appeals Board decision of 10/3/90 is inconsistent with the procedural requirements of law and therefore unenforceable and void...

ARGUMENT

The Appeals Board as constituted to hear the appeal was in violation of the BOCA Basic/National Building Code 1721.04(d) as adopted by the City of Clarksburg 6/11/86 as Ordinance 86-17. Section 124.7 Action of the Board states that no member shall pass upon any question in which he... is interested.

Board member Ricky Schlicker is a close business associate of Carlton Wood, a non-setting member of the Appeals Board whose Company is a defendant in the pending USDC case. Mr. Schlicker's contracting firm was a prospective bidder for the contract to complete renovations of this building (see: Wood Deposition page 98, et. seq.) and is precluded by law from passing on this appeal. Therefore, the hearings were illegal and non-binding for lack of a quorum.

The CLARKSBURG MAINTENANCE APPEALS BOARD BYLAWS Article VII, Section 3, The Hearing, provides: "Every party shall have the right to present his/her case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts...".

Mr. Lewis' rights to submit documentary and rebuttal evidence and to cross-examine city officials were denied, especially during the 10/3/90 hearing when City Attorney DePolo repeatedly interrupted and interfered. The Board also heard allegations from City Manager Boroff which were unsupported by any evidence.

The Demolition Order expressly states: "...TO SEEK MODIFICATION OR WITHDRAWAL OF THIS NOTICE, PETITION... APPEALS BOARD...". Appeals Board Chairman Doug Gray improperly refused to consider modification of the order or to hear evidence regarding alternative dispositions of similar Orders by the Appeals Board. Gray repeatedly asserted: "Fix it up or tear it down." even though the city had denied Lewis a permit to make repairs for more than four years.

The estoppel argument has been extensively briefed in the federal case, USDC NDWV 88-105-c(k); all documents and deposition testimony in that case are hereby incorporated by reference.

The CLARKSBURG MAINTENANCE APPEALS BOARD BYLAWS Article VII, Section 4, The Decision by the Board, expressly requires that the decision shall state the facts found, conclusions drawn, and disposition of the appeal. (Exhibit F) No such statements of facts or conclusions are contained in the transcripts or the Appeal Disposition.

The building at 272-300 Monticello Avenue, though unattractive, poses no immediate danger to persons or property. The building is well secured against unlawful entry and not in likely to collapse.

CONCLUSION

The actions of the Clarksburg Maintenance Appeals Board were Improper, in violation of law, and void.

Respectfully submitted,
s/Tom Rodd

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31. PETITION TO MODIFY AND/OR WITHDRAW BOCA CITATION 272 - 300 MONTICELLO AVENUE

August 24, 1990
Building Commission
c/o Robert Bryan
227 W. Pike St.
Clarksburg, WV 26301

Pursuant to the DEMOLITION ORDER WITHOUT OPTION TO REPAIR executed by Robert Bryan, date unknown, and applicable City of Clarksburg Ordinances, petition is hereby made to modify said Order.

Petitioner asserts the following:

1. The City issued a Condemnation Order against the property pursuant to the Flood Plain Ordinance, Article 1747, sec. 1747.09 on May 23, 1986.
2. Federal Disaster Funds were available to the City when the Condemnation Order was issued, and at subsequent dates additional state and federal funds, for the express purpose of demolishing flood damaged properties.
3. The City made no effort to use available funds to demolish the building, even though petitioner made numerous requests that the City issue a demolition order and make available demolition funds.
4. City officials, including: the City Manager, Engineering Department, BOCA Appeals Board chair, senior Planning & Zoning member, and City Attorney John DePolo, without notice to petitioner, improperly discussed the subject property and petitioner's business affairs with FirstBank, the lienholder.
5. The actions and/or inactions by City officials wrongfully interfered with petitioner's then pending SBA Disaster Assistance Loan Authorization.
6. Without notice to petitioner, the City agreed to disregard the procedures required by statute, for persons aggrieved by actions of

the Engineering Department, and in diverting the property to First-Bank or its associates.

7. The above described actions are the subject matter of Civil Action 88-105-C(k) now pending before USDC Northern District of West Virginia. The City of Clarksburg, FirstBank of Shinnston, WYK Associates (CEO former Chair of BOCA Appeals Board), Autrice Thomas (P&Z member), and the US Small Business Administration are defendants in the USDC case. All documents on file in that case are incorporated by reference.

8. The question of liability for the cost of demolishing the structures cited in this Order is before the Federal Court, and petitioner has asserted that the City is estopped from any claims against him for demolition costs.

9. The salvage value of the structure at the time of the condemnation was probably sufficient to demolish the building, and additional demolition funds were available from petitioner's authorized disaster loan. Had the City and the other defendants not acted improperly, the structure would have been removed at no cost to the City.

10. Petitioner agrees that the building should be demolished, but asserts that actions of the City and others have denied him the funds necessary the effect the demolition.

11. The City should waive or be restrained from asserting any liens, penalties, costs, or imprisonment against petitioner; except that a lien may be asserted against the real property upon which the structure rests.

Respectfully submitted,
s/E. R. Lewis, petitioner
P.O. Box 286
Clarksburg, WV 26301

Received s/Bob Byran
Robert Bryan
Building Official

VI. OTHER MATERIAL

32. TRANSCRIPT

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELLIS R. LEWIS, Plaintiff

versus CIVIL ACTION #90-C-780-2
#93-C-792-2

BOCA APPEALS BOARD, ET AL
and JOHN L. DEPOLO,
Defendants

A hearing was had commencing at approximately 8:00 a.m. on Friday, the 23rd day of June, 1995, in the Circuit Court of Harrison County, in the city of Clarksburg, West Virginia, before the HONORABLE THOMAS A. BEDELL...

THE COURT: It comes on for proceedings at the present time the matter - two matters, which have been previously consolidated by the court. The first incaptioned (sic) Ellis R. Lewis, Petitioner versus Boca Appeals Board of the City of Clarksburg and the City of Clarksburg, Respondents and perhaps et al properly in that matter and that bears Case #90-C-780-2 and the second being Ellis R Lewis versus John L. DePolo, individually and as agent for the City of Clarksburg, P. Douglas Gray individually and as Chairman of the City of Clarksburg's Code enforcement Appeals Board and the City of Clarksburg. That matter bears the Case #93-C-792-2. The court would note that today is Friday, the 23rd day of June, 1995, and this matter comes on by way of hearing upon the pending motions to dismiss or for summary judgment, probably more specifically, which has been previously filed herein and which have been set at this time for ruling upon by the court...

THE COURT: Counsel, let me, I guess note then at least

preliminarily that the court believes that the record at this point and not just using the term in a narrow context the record from the administrative agencies that came up is developed sufficiently. I am not sure that there is any facts out there that have not been faired it out through the hundreds or thousands of pages contained in the record or the file of these two particular cases. The court is of the opinion that it does not need additional fact finding in order to base it's decision. The court would agree with Mr. Harless. I think it's within my authority to do that. As I understand I could simply reverse the administrative agency upon the record. I could vacate or modify it. I could uphold it without much comment assuming the appropriate findings are made. The court would believe further as Mr. Harless points out tha t would have the authority to take additional testimony and make additional findings over and above those already made by the administrative agency. The court believes that again I am familiar enough with the facts and allegations contained in this case that I am comfortable in ruling. All these matters and the court has to make a decision whether it's strictly a legal argument or whether it's a - such as a summary judgment motion on the factual allegations, which the court will get to, the court has to have a certain comfort factor I guess in what it's doing and first generally correct as far as the end result and two procedurally correct too. The end cannot justify the means, but I believe at least with a narrow, in the narrow issue of the Boca appeal whether the Boca Appeals Board acted properly, the court believes that it has sufficient information before it and no additional information would assist it in making it's determination. Counsel, just again just because of what I went through was basically a real brief procedural history just so I can understand say in the 1990 case in this instance what occurred and you all recognized that there was a original petition for an appeal by Mr. Lewis of the actions of the Boca Appeal Board and as I recall and don't hold me to the date. I am not sure that there was a date on the order, but that was a result of the October 31st, 1991 hearing after the remand back from

Judge McCarthy that there were two subsequent hearings and appropriate, an order made as a result of that remand by Judge McCarthy. After the time of the initial appeal of that order the city countered by filing it's declaratory judgment and it's injunctive relief pleadings that have been ruled upon in part at least as to the injunctive relief by Judge McCarthy and the court believes at least as to the request for injunctive relief, that's the law of the case in regards to this matter that Judge McCarthy's ruling, I did not look at that in any detail because I believe that's binding on both the parties. As a result of those pleadings there was a reply and I am not sure if it was incaptioned amended petition, but a reply and counter claim and the counter claim included a request for both compensatory and punitive damages. Just getting ahead of myself the counter claim is what primarily as I would characterize it formed the basis for the 1993 case. The request for compensation for the various claims of torte or breach of contract alleged by Mr. Lewis, the court hopes to address that momentarily, but at least procedurally that is what gets this here at this point. Again the court believes that proper analysis is the analysis much described In Chapter 29-A is whether the rulings of the administrative board were arbitrary or capricious or abusive discretion or clearly wrong in the probative substantial evidence on the record of the whole, the entire - I believe that there are six sub-sections in Chapter 29-A and I believe that that's really the proper analysis. Counsel for the Respondents in the 1990 case summarized those I think and had boiled those down to two criteria. Whether there was substantial prejudice of a material right of the petitioner as a result of the actions of the Boca Board and whether there was an abuse of discretion and really the standard and the court believes this is well taken. It appears and was pointed out I think in one or more of the Respondents or the Defendants' brief that just getting to the heart of the matter at this point that there is contained in the record from below statements including by Mr. Lewis that at least as in 1988 when some of these matters started and I realize that they have been on-going really

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since Mr. Lewis as I recall purchased the building. no doubt at least at the time that the building is in condemned. I think that there is admissions to that ecord. Certainly I don't anybody and I have driven by probably six months or whatever. I mean it's not on te home or anything, but I don't think anyone disputes ing needs to come down as of 1995, some five years al being filed. The real issue as a practical considera- issue is who has to pay for it and the court under-

Once it seems like we have gotten sidetracked the side issue of the actions of the various individuals, and Mr. Gray and those sorts of things, but the court the end result of the Boca Appeals Board was sounded on the evidence that there was substantial evidence to o support the fact that the building should be con- stood back at the time at least 1991 when the file order by the Boca Appeals Board. The court does not be- t decision of the Boca Board was arbitrary or capri- s abusive discretion. In theory in addressing is , the court could stop there and end it's analysis, but I the pleadings of Mr. Lewis' that have been filed and d on his behalf the court must look at the plethora of oncerning the procedural problems alleged by Mr. ether or not they affected any substantial right that he aterial right or any property interest that he would of that was so agrecious (sic) that it would override f the appeals board to the extent that this court should l testimony or send it back again by way of remand to l testimony or to guarantee what those procedural e afforded to the Defendant. The court does not be- that all of the allegations even if taken in a light most his point to Mr. Lewis and even taken in a light ac- ne is true rises to the level to where this court could - the judgment of the Boca Appeals Board. The court

believes that most of the allegations are of such a character that based upon the record that has been generated in five years in this matter are not based in fact or are well founded. The court does not, I mean is of the opinion that it does not need to address every specific allegation of wrong doing that Mr. Lewis has raised because even if taken as true those allegations at least in the narrow context of the Boca Appeals case do not rise to a level that they have substantiated prejudice or material ratted (sic) the petitioner. So consequently having made those findings let me find that the actions of the Appeals Board as of and again I believe it's 10-31-91 and I - it may be 1990 on the year, but I believe it's 1991 were proper. That the Defendant was afforded substantial due process rights. That there was no violation of any substantial due process rights. That the Petitioner was given the opportunity to be heard, present his side of the case and that the simple fact that he disagrees with the ultimate ruling, the court does not believe is sufficient for the Boca Appeals matter at least as to the appeal to go any further. So again and I am not sure that again procedurally, I believe there was a motion to dismiss that really brings us here today on that matter. Whether it's a motion to dismiss or the court just ruling on the appeal itself, the court would grant the motion to dismiss and in fact uphold the actions of the Boca Appeals Board with respect to Mr. Lewis. As I indicated earlier it appears that Judge McCarthy has addressed the portion of the relief sought by the city as far as a prospective injunctive or declaratory order requiring the Petitioner to affirmatively demolish the building and the court believes - one, I again believe that that is the law of the case and that this court even though it's within it's power to review that, the court would decline to do that. That was briefed extensively by Judge McCarthy. I have reviewed that. I do not see anything where I feel that Judge McCarthy was in error. So let me as to that portion of the pleadings grant and again I will have counsel assist me. I am not sure if we are going to characterize it as an injunction or an order requiring the Petitioner in the Boca matter, Mr. Lewis to demolish the

buildings located on Monticello Avenue, which is the subject of these proceedings. It would be my order and again I will hear from counsel and again that that's to be the begun, that demolition is to begun within 45 days from this date. And it is to be completed within a 120 days from this date. Let me stop at this point because that allows or it remains then in the 1990 case the counter claim for momentary damages and gets into the 1993 case. Mr. Costa, since it's your dog in this hunt as far as the 1990 case is an injunction the proper vehicle to use requiring Mr. Lewis to tear down this building?

MR. COSTA: Your question, sir, was I am sorry. My attention was distracted momentarily.

THE COURT: No, that's fine, sir. My question was procedurally what vehicle is used to accomplish the order of the court to demolish the building. Is that by way of injunctive, by way of extraordinary relief or just a court order requiring him to do that?

MR. COSTA: We believe a declaration in order carrying out the court's decision as just indicated would be sufficient.

MR. COPLAND: May I interrupt the court for a minute?

THE COURT: Yes, sir.

MR. COPLAND: In addition if the order is not carried out --- to see supplemental leave to to adduce that judgment to momentary, you know, if it has to carry out the order.

THE COURT: And I think Judge McCarthy addressed that then the burden would be on the Respondent in this case to come in and ask for that additional relief. Whether it's to reduce it to a judgment based upon I guess estimates at that point or if the city is going to affirmatively tear it down and bill Mr. Lewis or and I am certainly not suggesting there is any contempt power of the court or something. I mean.

MR. COSTA: That's correct, your Honor. All we want is the right to come back.

THE COURT: I think you can reserve that right. I don't think you are waiving it by just merely getting an order from the

court requiring it to be instituted within 45 days and completed within 120 and that's consistent with the original time frame back in 1991 if that's the correct year that the Boca Board required. I believe it was 30 days and 120 days was the appropriate time as I recall.

MR. COPLAND: Your Honor, I am appearing as additional counsel for the city in a case that came up covered by their insurance coverage and since the court's ruling, I have a hearing at 11 and ask permission of the court to go ahead ---.

THE COURT: You may be excused then and we appreciate your assistance this morning. Let me to the extent that there is a final ruling upon at least as too this initial issues(sic). So let me note the strong objections and exceptions of the Petitioner to the court's findings and rulings, which will be preserved in the record and may be reflected ultimately in the order which results from today. Counsel, yes, sir, Mr. Harless?

MR. HARLESS: Briefly?

THE COURT: Yes, sir.

MR. HARLESS: Your Honor, in respect to our position that the administrative procedure ----- made clear on the record that was confined to the discretion and authority of the court here to take additional evidence. Our position is that in the municipal field again under the spirit and if not the letter --- was a little vague in this area and certainly in other areas it talks about using the standard -----, which the court reviewed, does not by a limited --- review that enters such orders and the administrative body should have been making some factual findings and some in fact against the law. I will make that clear that in our position with the APA defines to the extent for the discretion I think that is that. I think also such ordinance ---.----- I would just like to have that in my objection, your Honor.

THE COURT: Okay, let me note that and I am not sure that there is such a difference in the standards of review that - and I believe and I am not sure that there is any difference in really the

standard. Mr. Costa as I recall in his brief has it - appropriate citations and I am not sure whether the - what we call the animal that changes the court's decision in any respect. Again the court is not here - even if I believed it appropriate not here to substitute it's judgment and that of the administrative appeals agency. Counsel, going on then addressing the and I hope to do it collectively the remaining claims for the more traditional torte and I believe there was a contractual claim or two referred to in the counter claim as well as the in the 1990 case as well as the 1993 case in it's entirety. Let me address those collectively because really there is an over lap between the two. I know Mr. Yurko and Ms. Florio has(sic) spent some considerable time in their briefs arguing that the 1993 case should be dismissed because they are saying areas were referred to were covered or should have been referred to are covered in the 1990 case. The court is not persuaded by that. It appears - I am not sure that the two aren't duplicate of one another, but the issue is that those allegations and those claims need to be presented and whether its done by way of counter claim in essence or whether it was done by the 1993 case, the court does not believe - the court is not persuaded that that should be the basis for review of the summary judgement in the 1993 case with the overlapping of the 1991 case. As counsel is well aware the - perhaps if not the standard the policy behind summary judgment is (sic) recently re-articulated by the Supreme Court of Appeals to where moving from a policy almost demanding that summary judgement not be granted except under the most extreme cases to one to where for lack of a better description almost encouraging it where facts and the law are applicable. The - one of the cases, the first case that held that was Williams verses Precision Coil, which was a case out of this circuit in this division that articulated a new policy in essence for summary judgement. The court believes that that is the proper framework in which to view the summary judgement motion of the 1993 case and I guess the motion to dismiss of the counter claim of the 1990 case as well. Counsel, if you will bear with me. I guess the first point I

would raise is that the court believes that as I have indicated it is not persuaded by the collateral estoppel or race judicatio(sic) or those arguments made in the 1993 case as they apply or compulsory counter claim as they were raised in the '93 case and applied to the '93, 1990 case. I think the court has to review the sum as I recall 10 counts in the complaints within the standard set by Rule 56. Initially the most simple, most easiest and I believe without question just kind of taking a few of the issues without addressing I guess it does address the first as I recall, first or second count against the Defendants, DePolo and Gray and the easiest call to make with respect to the 1993 case involves Defendant Gray because as an individual, because the court has received the arguments of counsel in connection with the allegations of Defendant Gray, that Mr. Lewis on prior occasions indicated to this court that he felt that Mr. Gray was acting fully within his capacity as chairman of the Boca Appeals Board and that Mr. Gray comes out as an individual without question. Likewise Mr. DePolo, the - which I believe again is either count one or count two. The court believes that the facts that were taken in their totality and that when viewed by the standards of Rule 56, Mr. DePolo as an individual likewise should come out. The court received all of those arguments in the confines of the 1990 case or maybe it was the '93 case, excuse me. Earlier the court reserved ruling on Mr. DePolo, but after having reviewed the file in this matter again, I do not see anything other than the requirement that Mr. DePolo as an individual should be dismissed out. I think all of his actions complained of were not outside the scope of his authority or position of city attorney and that they were all taken on behalf of the city as it's agent serving their employee and the court believes at least as an individual Mr. DePolo likewise should be dismissed. As to the various counts and I am not sure that all of them did not include a request for punitive damages, the court has addressed the issue of punitive damages, via - via, the government torte(sic) claims and insurance reform act if that is the proper consideration as I recall Chapter 29-12A-7 as I

recall. Again that may be an abuse and neglect statute or something. I mean we could be way off, but that I believe that is the proper citation. The court believes that the law is clear that as plead that the claim for punitive damages under these circumstances likewise or not likewise, but is barred by the Torte Claim's Act that under these circumstances that the city and the agent it's agents, servants, employees are protected from punitive damages from as claimed in this particular case. Addressing again counsel and just looking and again I indicated that I would be disjunctive. The court believes and as I recall Mr.Yurko, Ms Florio in their brief on behalf of the city and the defendants in the 1993 case argued that even if all the facts were true that these Defendants are immunç from liability and the court believes that is a basis in which summary judgement should be granted as well. The court believes that they are not subject - the actions complained of are not such that the Defendants would not be immune from the wrongs complained of by the Defendant. Looking it appears by my general comments that we have addressed counts one and two. Those are against the individual Defendants, DePolo and Gray and those counts will come out by way of summary judgement. As I recall and from some of my notes in some of the counts are rather confusing, but counts three and four, the court has quite frankly addressed collectively count 3 as contained the allegations of malicious prosecution and false statements in the record and count four also complains of procedure irregularities in the Boca Appeals process. As I recall there were also complaints in count 4 involving statements made by some of the defendants or it's (sic) agents to the SBA and that those interfered with the Defendant's rights and his ability to turn a living. Counts Three and Four have been appropriately addressed and disposed of by the federal court proceeding. I don't know that I ever informed anyone that the court did review briefly and I can't say that I since the other, since the federal court file was voluminous that I studied it in any great depth, but looked primarily at the orders and the findings and the brief from the federal court

and I believe that those are the same issues that have been raised previously, at least as to the reports to the SBA and that I believe that whether it is raised judicatio(sic) or collateral estoppel or starry decises(sic) that those issues have been litigated once and that there is a final decision that was rendered by the federal court here and which was upheld by the Fourth Circuit. Likewise to the extent there were allegations concerning false statements and record the court is not sure what the basis of that is if that is false testimony was presented, I am not sure that that is what is really what is being argued. If the claim is some sort of defamation or something along those lines, the court would believe that it's - that those would be privileged. I believe that that was argued by the Defendants and again I couldn't - as to counts 3 and 4, the court had a difficult time understanding the - what was being claimed and trying to give those counts the broadest interpretation. The court believes that any false statements if made were privileged either by Mr. Gray or by Mr. Boraff as I recall was mentioned in that as well. Likewise on the malicious prosecution, which I believe in contained in either Count 3 or 4, I am not sure that if that's - I am not sure I guess to begin with that that is an appropriate theory. As I had in mind, I am not sure that any of the factors for malicious prosecution are present whether it was malicious or whether it was done without reason or probable cause or whether it was terminated favorably in regards to the, in this case the Plaintiff in the 1993 case. I don't think any of those elements in the event that that that(sic) does state a cause of action for malicious prosecution, the court does not believe that any of those elements have been met. Likewise the time sequence or the chronology would indicate that the actions weren't taken in retaliation for any actions taken by Mr. Lewis. Likewise I am unaware that there was any allegation even in the selected enforcement of the additional counts in the amended complaint that there was any - with that selected enforcement or the malicious prosecution was done for any evil, improper basis or against a protected class, race, color, creed, national origin, those

sorts of things. Counsel, just let me interrupt myself, quite frankly again perhaps I missed it since the record in these matters are full and complete, I never did find an order allowing filing the amended complaint. We have all been addressing it and the motion to dismiss and those sorts of things. I never saw whether there was ever a motion to amend that was granted. Obviously under Rule 15 that it is pretty liberal in granting that. It appears from the record that Mr. Lewis simply mailed to the clerk and perhaps served on the competing counsel a document entitled Amended Complaint. The court is addressing that. I am not going to get hung up on some procedural technicalities that we have been looking at that amended complaint for over a year now, but I am just making an observation. I never - I don't see an order and I may be wrong, but I don't an order where that has properly been before the court, but addressing it anyway just because we have gone on that assumption for a year, again the court is not going to get hung up on any procedural necessity. Mr. Harless?

MR. HARLESS: I just want to inquire. Your Honor, my understanding is that the Defendants here have not actually filed an answer and my understanding of the law in West Virginia what it generally is is a motion to dismiss which is what has been filed to my knowledge. It is not a response to a pleading because it was not responded to in any subsequent allegations so under Rule 15 there is no answer that has been filed --- the court --- it's been filed and ---- and that's the theory we pleaded on.

THE COURT: Without looking and again we are still - the court is looking at the amended complaint and has looked at the amended complaint. My initial reaction is that it did not occur to me whether it's under Rule 15 that it - I am not sure that it is limited to filing an answer. My recollection is it is some of the language the answer or appearance or otherwise made an appearance or something. But the court is not, you know, perhaps I have gotten this down the wrong path as far as that goes.

MR. HARLESS: I am not trying in any way to interrupt,

your Honor, I just clarified the point.

THE COURT: Okay, and you may very well be correct.

MR. HARLESS: That is why we proceeded, your Honor, --- point --- the law -- some people ---. The other thing the court has indicated that we are in a summary judgement proceeding. I don't recall anyone having filed a motion for summary judgement. Matters outside the record I understand how --- generally the rules of civil proceeding. --- motion to dismiss, but again I think that is the discretion of this court, but after we got the file here having gone to summary judgement hasn't been that analysis. I have never seen a motion for summary judgement here. The briefs and so forth have been in support of a motion to dismiss and I realize that the Supreme Court seems to have altered it's standard somewhat. It seems so, but I am not sure on summary judgement. I understand why the court has the analysis it has, but I don't think it has on the motion to dismiss--- other things ------. I didn't want to make a speech, Judge, but you said summary and I was just looking through the file and I don't see anything where the motion for summary judgement has been filed or where the court has explicitly said this is a summary judgement. If you got any other information to put in or evidence we can put it in. I just didn't know we were on a summary judgement here. There haven't been any notices of that fact.

THE COURT: Mr. Yurko.

MR. YURKO: If I may respond, your Honor, I think the rules are clear that if they are matters that are being considered outside the pleadings, a motion to dismiss, I think the court in it's discretion can convert the motion to dismiss the motion for summary judgement. So I believe the court has well been supportive to consider this as a motion for summary judgement as opposed to a motion to dismiss.

THE COURT: Counsel, and perhaps I was wrong. Perhaps by definition the pleadings began years ago by way of motion to dismiss. We have certainly filed and I am not sure that there has

been specific affidavits. It seems like there has been one or two short affidavits filed in the record of this matter. I guess the point being whether it's a 12-B motion or whether it's a summary judgement motion. The court believes the analysis really is most appropriately a Rule 56 analysis because there are things that both sides have submitted. There is(sic) representations that both sides have made as to what the facts are and the briefs. There has(sic) been countless documents submitted by both sides, which the court has reviewed. I have not heard anything from anybody that either after 5 years in the 1990 case or after two years in the 1993 case that all the facts haven't been fared out. Again there are hundreds or thousands of pages that documents in this and again the court is required to look at the -under either standards the totality of the circumstances and it is viewed most favorable to the non-moving party and the court believes that the Rule 56 analysis is the proper one to apply and that's the approach that I have taken. That after all these years certainly the facts have been developed because at least one of these matters was set for trial a month or weeks, well probably a month ago and at that time of that final pre-trial which was very abbreviated, this was the process that the court indicated that it was going to file and there was no objection - follow and there was no objection at that point to handling it in that manner and seeing what - I mean I don't think there is any question in the court's mind that the 1990 case as for the two portions are properly had to be addressed or not had to be, but most appropriately addressed by the court and prior to looking at the facts or the merits of the factual allegations for the claims of torte and breach of contract. So let me note the objection that has been interposed by Mr. Harless as to I guess the process, the procedure that we are following because again I am not what I am hearing that perhaps the standard may be slightly different, but I am further not hearing is that there are any facts out there that needs further discovery and again since we are post in theory trial on I believe it was the '93 case that was set and don't hold me to that. At least one of these were past

the time for the trial to have occurred so certainly all of the facts would have been developed by this point. Mr. Harless?

MR. HARLESS: Your Honor, excuse me, your Honor. I hope this isn't anything, but your Honor, we think there is a material critical not only legal distinction between the standard of a motion to dismiss is what it simply says in the pleading. A summary judgement has not been filed. Now we know the court has the discretion if matters outside of the record were referred to, but transforming it into a summary judgement proceeding, Rule 56 says on notice of the parties to put in all the information they want in. How could it be that the court has entered a stay of our discovery which we believe to be highly material here and haven't been able to engage in any discovery, although we made a request and had a hearing on it and yet the court is saying on summary judgement we didn't even have a chance to develop any of these facts that were deemed material. The court did not deem them material and it seems as though our request for discovery have been totally quashed as in provident and needless or frivolous, but since the court issued a stay and put a ruling on a motion to dismiss and we didn't have the benefit of discovery, frankly if I had known this was a summary judgement proceeding, if I had been given notice on the face where the court has entered into a summary judgement posture, we indeed would have produced affidavits because that is enough to withstand, you know, a good faith under oath that raises the --- fact.

THE COURT: Well I don't know that I disagree with that. I think it needs more than a bold allegation contained in that affidavit.

MR. HARLESS: No, not bold. I am talking about alleging the facts, no alleging facts, your Honor. Now in the motion to dismiss I don't see with respect how the court may legitimately tell us we can't engage in discovery.

THE COURT: Now Mr. Harless, you are kind of arguing the facts most favorable to you, but that's not really accurate. You

have had five years to develop the 1990 case. You have had two years to develop the 1993 case and the stay has only been in effect in about 6 weeks or two months, sir. So you can't say well gee, and the fact that the 1993 case was set for trial. So I don't know how you can say that the - that you haven't had an opportunity to develop the facts and put those in an issue.

MR. HARLESS: Your Honor, I am not saying that we substantially haven't had an opportunity. What I am saying we have not had, your Honor, with respect we have not had notice either by the other parties or by the court that this matter is going to be resolved other than on a motion to dismiss. The parties didn't file any motions, any summary judgement motions and with respect that the court has not indicated to us on or off the record that this matter was going to resolve by summary judgement. Rule 56 does not require the court to get on the summary judgement track when the motion to dismiss is filed. Regardless of what we have referred to if the court by discretion does that, notice, adequate notice must be given the parties, both parties to submit whatever other evidence or arguments they deem so people can have an opportunity. That's what we are basing it on. The court is going to tell you this thing has lagged on too long. We haven't had an opportunity to tell the facts. I don't think you can totally rely on that stay order. The court is correct. I mean at some point you have done --, but our concern is we didn't know it was a summary judgement or frankly it would have been derelict not to submit some affidavits on some of these points I mean if we could. Is today the first time, your Honor, I represent to the court as an officer of the court that we are on a summary judgement track. I didn't want to derail the court, but I do want to put an objection. I think I have done that in a rational course and I don't want to - I don't want to just keep talking about it.

THE COURT: Okay, and the court doesn't take that personal and I understand your position.

MR. HARLESS: I want to put an objection on the record,

your Honor.

THE COURT: Sure, Mr. Yurko?

MR. YURKO: I would just like to note that I don't requirement (sic) that there be a specific notice that a hearing is either a motion to dismiss or a motion for summary judgement. Counsel can't argue that he did not have an opportunity to address the issues raised in the motion to dismiss. There have been briefs filed, there has been documents submitted outside the record. It's within the court's discretion to change if it wants to call it a change by hearing or motion for a motion to dismiss to issue an summary judgement. It has nothing to do with whether a party has appropriate notice or not. I think that the Plaintiff, that Mr. Lewis and his counsel have had ample opportunity to address the issues, to present evidence that they thought was appropriate for the court to review and the court has done that and I just don't think Mr. Harless' analysis is correct on the notice and on the status of the hearing.

THE COURT: Okay, counsel, let me note all that for the record and I have a sneaky suspicion that someone may look over my shoulder on this and that's fine. Not to be glib about it, but my paycheck will come at the end of the month whether they reverse me or whether and have me and think that I am the world's dumbest or laziest judge like the former Justice Neeley or whatever. Without trying to sound self serving what the court's(sic) do is not arbitrary or capricious. I mean I had - I have sat where you all are and had judges walk up and say well you win, or you lose and turn away and leave and what I have tried to do in my analysis today is to look at everything as closely as I can and thoroughly as I can and make my best decision whether it's in or out. Thus far obviously everything is coming out, but let me note all that for the record and just so nobody is waiving any rights that they have and the court has broad shoulders and if this gets laid back on it, that's fine. We will pick up the ball and run with it at that time. Let me, I believe I can summarize a few general observations as to the remaining counts because I have combined a couple three of them and my

findings would be raher limited or brief on those, but moving what the court has done i kind if categorized or classified Counts 5, 6, 7, which all deal gnerally speaking with the sanitary serve(sic) system complaints hat affected the foundation of the Monticello property. That it ws installed improperly or that there was a contractual obligation b maintain integrity of the building or that it was improperly installed and maintained. The court is persuaded that even though tha might be deemed nor considered a continuing torte, it's an on goig there is still once the Defendant, excuse me, once the Plaintiff i aware of those problems and has notice of those problems or th breach of the contract as the case may be, the statute of limitation applies under those circumstances. The court is of the opinion tht whether it's the 1980, the approximate 1980 date when the property was purchased from Mr. Lewis or whether it was the '85 date after the flood and there was additional perhaps damage discovered n the foundation and that that the two year statute of limitation aplies to the torte allegations and that the statute of limitations did peclude those three counts as well. Further in the event that therewas a contractual obligation that and the court at this point does ot recall whether they was(sic) in writing or whether it was an implied contract, but that's obviously either a 5 or 10 ten statute and the court does not recall and perhaps counsel can correct me thatthere was a written contract maintaining the integrity and the cout does not recall that. So that would obviously be a five year statute of limitations and that those counts likewise would be barred. Counts 8, the court has addressed individually or looked at individualy. That's the fact that there was documents removed by the Cityor the City Engineering individuals or department and that somehow has caused the lack of record keeping in the city has somehow caused injury to the business interest and affected the Plaintiff's abiliy to turn a living - the court is unaware I guess going back to our torte shaving mirror of definition that's supposedly we are all supposed to put on a mirror in the bathroom at our first year law school about duty and breach of duty and causation

of damages. The court is unaware of any duty to maintain those records as they might benefit a private individual. Even assuming that their records are lost or destroyed, even that breach, the Plaintiff has not shown any evidence causation of damages as a result of that breach even if there was a duty. So Count 8 likewise should be dismissed. The final two counts, which are new to the 1993 case is the selective enforcement counts that perhaps individuals either subsequent or prior to or subsequent to the ownership of other properties owned by Mr. Lewis were treated differently. As the court has earlier referred to with respect to the malicious prosecution, one, that there has been no showing as far as any malicious or evil purpose in any selected enforcement. There has been again no showing that that selected enforcement if true was even driven or was caused by any thing against a protected classification and the court believes that Counts 9 and 10 likewise should be dismissed from the 1993 case, which as I recall is in the amended complaint and that's not addressed in the 1990 case. Let me counsel, I believe that those are their general findings that I would make. Let me do this. Let me again note the objections and exceptions of the Plaintiff in this action and the Petitioner in the '90 action to the court's findings of facts and conclusions of law. In fact note their strong objections as to the findings and conclusions being made which will be preserved in the record. Let me and I am not sure if it's a backhanded compliment. After having spent considerable time with everybodys writing style on the various briefs and response briefs, I am going to compliment Mr. Costa in his writing and his style, which is closest of everybodys to the court's as far as just the use of language. So let me lay upon Mr. Costa if he would be so kind the responsibility of preparing an order?

MR. COSTA: I certainly will, your Honor, but I am not deserving of the court's praise, rather Ms. Florio is. She carried the laboring for the preparation of the brief and I would like to acknowledge that to the court. I had small input to it, but it was Ms. Florio who did that.

THE COURT: Would you having made the general observation and perhaps identified the incorrect attorney, would you wish to defer that to Ms. Florio?

MR. COSTA: Oh, not at all, not at all. I may consult and we will surely consult with Ms. Florio so that we can maintain the standard as the court would expect.

THE COURT: And I know all the counsel and Mr. Harless and everyone has put considerable time and effort in this matter and I certainly have not done this lightly. I tossed and turned last night again. What little consolation I can probably still count after going on three years on one hand the summary judgement or a motion to dismiss were granted. So again without trying to sound too self serving I haven't taken my responsibility lightly, but I believe again that that comfort factor is there. Not only on the process and procedure, but the ultimate outcome of the court's ruling. Counsel, anything before we secure the record in this matter? Mr. Harless?

MR. HARLESS: Your Honor, we would like to inquire, I think I observed this straight, but I want to make sure procedurally, is this the court's final ruling on this?

THE COURT: Yes, sir.

MR. HARLESS: On all these matters?

THE COURT: Yes, so that it would be once prepared and entered.

MR. HARLESS: Following this final order, I mean there is nothing else?

THE COURT: That's correct. I am of the opinion there is nothing left. So once we get it entered, it will be an appeal board.

MR. HARLESS: Your Honor, in the, say perhaps I can make this motion now or I can do it later before the court, but in respect to the court's final judgement order, I think the, and particularly I think one of the court's comment or findings that if Mr. Lewis did not tear the building down within 45 days.

THE COURT: Or begin that process, yes, sir.

MR. HARLESS: Have I got it right, your Honor, that be torn down within what, 125 days?

THE COURT: Yes, completed.

MR. HARLESS: But I mean further that by summary judgement or motion to dismiss the other claims worked out as it were totally, correct?

THE COURT: Yes, sir.

MR. HARLESS: It doesn't seemed to have happened however to the order for us a chance to appeal. Obviously the State--- on the other because I am going to have about the other one, but here is an affirmative element of the order that directed Mr. Lewis --- and what we would like to move the court to do under the civil rules and otherwise is to ask the court to stay the begining of that order for a reasonable period of time to give us a chance to - if we, you know, on reduction if sat aside is well made that we would wouldn't want to make that decision hastily, give us a stay for areasonable period of time....

THE COURT: Even without hearing from the Defendants, I think a reasonable stay is appropriate under these circumstances, but what I would like to do Mr.Harless is to be very honest with you and hold your feet to the fire and make you make that decision relatively quickly and I am contemplating 30 days give you in my mind the opportunity for reflection and a review of the standards of review of what I have done and your chances of success and those sorts of things....

THE COURT: And then within 30 days require you within 30 days of receipt of that transcript to have an appeal filed. Otherwise and I am just thinking out loud, otherwise when the 45 days and 120 days kicks in, if no appeal was filed within 30 days.

MR. HARLESS: Forty-five days after that.

THE COURT: The time starts running for Mr. Lewis at the end of the 30 days, which is at the end of the two week.

MR. HARLESS: I understand.

THE COURT: And obviously as you pointed out that

building is not going anywhere and is not going to get much worse in the next few months over what it has been in the last few years, I suspect.

MR. HARLESS: Well, your Honor, ----.

THE COURT: I don't want you to have to spent the next few nights non-stop working to get something done under the circumstances.

MR. HARLESS: Well, your Honor, I appreciate it and I think it's a reasonable time period, your Honor.

THE COURT: Let's do, Mr. Costa?

MR. COSTA: I am sorry, but because I represent the city I would just like to note it for the record that we will check with the city regarding, the engineers regarding the condition of the building. I do not know whether it represents a safety hazard in it's present condition. I know that it is continuously deteriorating now over a period of some 10 to 15 years. So we may wish to address the court further on if we get some information.

THE COURT: Okay, let me note that and if you need to bring something before the court, we will all go back together.

MR. HARLESS: In respect to the property issues.

THE COURT: Mr. Costa is worried that perhaps I don't mean to put words in his mouth, perhaps the building is in a far greater state of disrepair than any of us realize and if it is truly a safety hazard or a health hazard, then we may need to review the position of what he is suggesting.

MR. HARLESS: Well he would have a right to make a motion. The court has always got some jurisdiction.

THE COURT: That would be the court's opinion as well.

MR. HARLESS: Yeah, of course.

THE COURT: Mr. Lewis, do you wish to address the court?

MR. LEWIS: I have a problem here and I think the verdict shows that during the time that the position to control that building, the building was secure on two different basis. Not with

standing this court's order that I do something within 45 days, I do not own the property. I have not owned the property for some time. According to the tax sales three years ago, the City of Clarksburg owns the - its on the record, on the public record stating that they own the building and I don't own the building, I do not feel that I am obliged or authority to take any action down there any more than I control next door to that property and do something over there. I have no right, title or interest in that building at the present time.

THE COURT: My initial reaction and perhaps that's a subject of some sort of writ of prohibition or issue on appeal or something subsequent to today. I am of of the opinion that this court has had jurisdiction over Mr. Lewis and the building in essence since at least 1990 and subsequent occurring events does not relieve Mr. Lewis of the responsibility of complying with the court's order and complying with the original order, I guess, in essence now of the Boca Board. Let me treat it in that manner and that's not being waived. That's an interesting question and I don't know truly what the answer is, but my initial reaction is that making an analogy to child custody, where the court can and this isn't even subsequent to a final order. This is during the pendency of things. So I don't believe the court has lost jurisdiction to compel Mr. Lewis to do something, but.

MR. HARLESS: We just want to make an objection, your honor.

THE COURT: Sure, that will be preserved and can be argued and that may resolve everything. So and if it does God bless all of us if that's the determinative issue of the case after all this. Anything on behalf of the Respondents or the Defendants before we secure the record?

MR. COSTA: Nothing further, your Honor.

THE COURT: If there is nothing further, we will stand in recess.

Whereupon, the hearing was duly concluded.

33. Notice to Redeem Delinquent Real Estate
November 9, 1994

TO: Ellis R. Lewis, P.O. Box 2403, Riverside, Ca. 92516

You will take notice that City of Clarksburg, the purchaser of the following described real estate situate in Harrison County, West Virginia: Certification No. 4824, 10 lots, 1 to 9 and Showalter Lot, Monticello Avenue, Clark District, Clarksburg, which was delinquent or nonentered in the name of Ellis R. Lewis, and was sold by the undersigned Deputy Commissioner of Delinquent and Nonentered Lands of Harrison County at the sale for delinquent taxes or nonentry on the 30th day of September 1994, has requested that you be notified that deed for such real estate will be made to them on or after the 1st day of December, 1994, as provided by law, unless before that day you redeem such real estate. The amount you will have to pay to redeem on the 1st day of December, 1994, will be as follows:

Amount of taxes and interest due at date of sale, plus interest	$680.74
Amount of charges due on date of sale, plus interest	21.42
Deputy Commissioner's Fee	112.11
Amount of taxes paid on the property since the sale, with interest to December 1, 1994	0.00
Amount paid for title examination and preparation of list to be served, and for preparation and service of the notice, with interest to December 1, 1994	57.16
Amount paid for other statutory costs, including Notice fee	25.00
TOTAL	$896.43

You may redeem at any time before December 1, 1994, by paying the above total less any unearned interest.

Given under my hand this 9th day of November, 1994.

s/H. Laban White

34. Denial of Request to Repair
May 20, 1986

City of Clarksburg Department of Public Works
May 20, 1986
To: Mr. Ellis Lewis
From: Paul F. Veltri, Director of Engineering
Subject: Application for Building Permit for 276 Monticello Avenue, Clarksburg, WV to Repair foundation and comply with Building Codes.

A Building Permit is required for the above mentioned address, but at this time we do not feel that we can issue such Building Permit due to the excessive amount of repairs...

s/Paul F. Veltri
Director of Engineering

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35. Memo on Storm Sewer Improvements
June 23, 1981

...
Mr. Patsy Trecost, City Manager
June 23, 1981
Dear Mr. Trecost,
Thank you for the opportunity to meet with you and discuss Monticello Avenue traffic problems and especially my goals for rehab in the Thompson Street area. It is my understanding that the options are:

Speed control: A radar patrol will be available on a periodic basis on Monticello Ave.

Pedestrian crosswalk: An investigation will be made by the Traffic Division of the Street Department as to the feasibility.

Storm sewer improvements: Mr. Jon Kearns, City Engineer, will develop cost alternatives. Council approval may

be required.

I hope that the possibility exists for clearing the decayed houses from the NE corner of Thompson and Monticello. A neighborhood playground would benefit the 36 children living in the apartments as well as children participating in the new Head Start program in the adjacent property.

I appreciate your candor and look forward to a revitalized area contributing to a healthy Clarksburg.

Kindest Regards,
s/E.R. Lewis
Ellis Lewis

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36. Structural Soundness

HORNER BROTHERS ENGINEERS

August 15, 1980

Ms. Terry Rife
City of Clarksburg
Office of Housing Rehabilitation
and Community Development

Re: 276 Monticello Avenue, Clarksburg, WV

Dear Ms. Rife:

I have inspected the building located on Monticello Avenue and find it to be structurally sound in its present condition.

The only proposed change is the relocation of "braces. These braces can be lowered and still remain within structural steel code requirements.

The walkway extension and cantilever beam work will be done in strict accordance with the drawings. The welding will be done in accordance with AISC specifications.

If you have any questions or need any additional information, please do not hesitate to call.

Yours truly,
s/Henry A. Thrasher

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37. Compliance with Flood Plain Ordinance
August 13, 1980

City of Clarksburg Engineering
TO: Terry Rife, Rehab.
FROM: Hugh J. Marsh, City Engineer
DATE: August 13, 1980
RE: Rehab. Project at 276 Monticello Avenue.
Dear Terry:

The plans and specifications for the referenced project have been received and reviewed. All remodeling work specified involves the three upper floors of the building which are above the regulatory flood elevation.

The lower floor which involves only storage rooms is not a part of the project and their future use is to be abandoned.

With the above understanding this office can certify that the referenced project is in compliance with the Clarksburg Flood Plain Management Ordinance.

Very truly yours,
s/HUGH J. MARSH
Hugh J. Marsh
City Engineer

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38. Right of Way Agreement
December 16, 1958

Book 817 PAGE 203

RIGHT OF WAY AGREEMENT

THIS INDENTURE, made this 16th day of December 1958, by and between Cecil C. Golden... and the Sanitary Board of the City of Clarksburg

> "It is a further condition of this conveyance and part of the consideration thereof that... the actual sewer main will not be constructed closer than ten (10) feet from the outer

extremities of those said piers or supporting concrete structures... supporting that certain apartment building"

Book 817 PAGE 204

"...further that should such excavation and construction... result, or threaten to result, in damage to said apartment building or structure, the said parties of the second part will take all necessary action in building supports, lateral and vertical or otherwise as necessary, shoring and supporting said building so as to prevent such damage. In event said threatened damage is of a continuing and permanent nature as determined by a competent unbiased engineer the said parties of the second part agree to install such permanent piers or other supports recognized as adequate under standard engineering and geological practice to insure the continued safety to said building or structure in the future."

s/ Cecil C. Golden
s/ Henry A. Thrasher
s/ William F. McCue
Notary Public